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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Joseph M. Strickland, Master-in-Equity

Appellate Case No.: 2017-001795
Civil Action No.: 2014-CP-40-01805

Raglins Creek Farms, LLC, ...Respondent,

v.

Nancy Dunn Martin, ...Appellant.

RECORD ON APPEAL: VOLUME V OF V

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1 readings, fair readings of these statutes of
2 limitations, one, and two, putting a gate on an easement
3 in South Carolina by the servient landowner is not --
4 that's allowed under certain circumstances.

5 So this notion that once that gate went up --
6 even though there was continued use, and they were still
7 in possession of the easement, continued use of the
8 easement, that does not implicate either of these
9 statutes of limitations.

10 Now, what they want to do is talk about the
11 context of Pittman v. Lowther in the context of the
12 statute of limitations. Those are two different
13 analyses.

14 The statute of limitations analysis is, Were
15 you seized of possession?

16 No. We continued to use it.

17 Were you in possession of the same part
18 thereof within 40 years from the commencement of the
19 action?

20 Yes, we were.

21 Pittman v. Lowther, we point out in our
22 memorandum, is, What constitutes an interruption in a
23 prescriptive easement? Not applicable to an express
24 grant. Nothing to do with the statute of limitations.
25 What constitutes an interruption in an express (sic)

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39

1 easement?

2 And our argument would be that interruption
3 requires some sort of -- even if it's brief -- some sort
4 of nonuse. And that wasn't what we had here. We had
5 continued use.

6 Thank you, Your Honor.

7 THE COURT: Anything further?

8 MR. FLOYD: I've got two quick points that I
9 want to point out, Your Honor.

10 THE COURT: Yes, sir.

11 MR. FLOYD: In Bundy v. Shirley, we heard talk
12 about there never was this asking of permission, that
13 they didn't ask anybody for permission. But Bundy v.
14 Shirley clearly says -- and it's a well-settled rule --
15 used by expressed or implied permission.

16 You don't have to say, You've got permission
17 to use that road. Implied permission is, You've got a
18 gate on that road, you can use it. That's how that is.

19 I'd also like to say that adverse use is use
20 without permission. And all the testimony, we believe
21 and we would submit to the Court, was that any use of
22 that right was with the permission of Ms. Martin or her
23 predecessors in title.

24 THE COURT: Well, I'll have to read them. I
25 haven't read either of the memoranda, so I'm going to

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1 take this under advisement.

2 Of course, your clients realize that no matter
3 how I rule, if there's an appeal, we're talking about
4 two more years of litigation. So I was going to say,
5 have you all considered settling this case? Do you want
6 to talk while you're here? We don't go back on the
7 bench until 2:00.

8 MR. FLOYD: We'll certainly explore that
9 option, Your Honor.

10 THE COURT: Okay.

11 Mr. McDonald? Mr. Wells?

12 MR. WELLS: We'd love to settle it, Your
13 Honor.

14 THE COURT: Okay.

15 Well, I'm going to take this under advisement.
16 Are you all under time constraints as far as the ruling
17 is concerned? Do you all need it by next week or next
18 month?

19 MR. WELLS: No, Your Honor.

20 MR. FLOYD: No, Your Honor.

21 THE COURT: Okay. I'm going to read this.

22 Thank you all so much.

23 (The hearing was adjourned at 11:32 a.m.)

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1 CERTIFICATE OF REPORTER

2

3 I, Caroll Anne Boutahar, Certified
4 Verbatim Reporter and Notary Public for the State of
South Carolina at Large, do hereby certify:

5 That the foregoing proceeding was taken
6 before me on the date and at the time and location
7 stated on page 1 of this transcript; that all statements
8 made on the record at the time of the proceeding were
recorded by me and were thereafter transcribed; that the
foregoing proceeding as typed is a true, accurate, and
complete record of the proceeding to the best of my
ability.

9

10 I further certify that I am neither
11 related to nor counsel for any party to the case
pending or interested in the events thereof.

12 Witness my hand, I have hereunto
13 affixed my official seal this 15th day of February,
2017, at Columbia, Richland County, South Carolina.

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Caroll Anne Boutahar
Certified Verbatim Reporter,
Notary Public
South Carolina at Large
My Commission Expires:
December 13, 2021

COPY

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Country Properties, LLC

☐ Plaintiff

v.

Nancy Dunn Martin

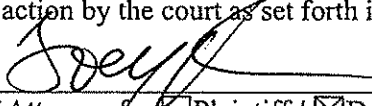
☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2014-CP-40-1805

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: John W. Wells, Bar No. Address: P.O. Box 10, Lugoff, SC 29078 phone: 803.438.4200 fax: e-mail: jwells@baxleywells.com other:	Defendant's Attorney: Joey R. Floyd, Bar No. 68491 Address: P.O. Box 61110, Columbia, SC 29260 phone: 803.252.7693 fax: 803.254.5719 e-mail: jfloyd@brunerpowell.com other:
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information Nature of Motion: Motion for Summary Judgment - Scheduled to be heard before Judge Strickland (10.27.15) Estimated Time Needed: 45 Minutes Court Reporter Needed: ☒ YES / ☐ NO	
SECTION II: Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.  Signature of Attorney for ☐ Plaintiff / ☒ Defendant September 15, 2015 Date submitted	
SECTION III: Motion Fee ☒ PAID - AMOUNT: 25.00 ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:	
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE _____ CODE: _____ Date: _____
CLERK'S VERIFICATION Date Filed: _____ Collected by: _____ ☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____	

COPY

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Country Properties, LLC,

Plaintiff,

vs.

Nancy Dunn Martin,

Defendant.

IN THE COURT OF COMMON PLEAS

Civil Action No.: 14-CP-40-1805

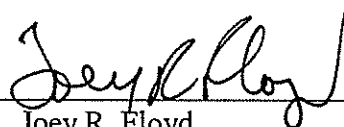
**DEFENDANT NANCY DUNN
MARTIN'S NOTICE OF MOTION
AND MOTION FOR
SUMMARY JUDGMENT**

2015 SEP 14 PM 3:34
JUDGE W. HODGINS
FILED

RICHLAND COUNTY
FILED

TO: JOHN W. WELLS, ESQUIRE, ATTORNEY FOR THE PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that Defendant, Nancy Dunn Martin, by and through her undersigned counsel, will move before the Honorable Joseph M. Strickland, on October 27, 2015, 11:30 a.m., at the Richland County Judicial Center, for an Order granting the Defendant Summary Judgment on all of Plaintiff's causes of action against Defendant pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. This motion is further supported by the Memorandum being filed contemporaneously herewith, the discovery in this case, argument, stipulations of fact and/or other materials as may be filed and served upon the parties in accordance with Rule 56 prior to the hearing on this motion.

By: 

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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Country Properties, LLC,

Plaintiff,

vs.

Nancy Dunn Martin,

Defendant.

IN THE COURT OF COMMON PLEAS

Civil Action No.: 14-CP-40-1805

**DEFENDANT NANCY DUNN
MARTIN'S MEMORANDUM IN
SUPPORT OF HER MOTION FOR
SUMMARY JUDGMENT**

Defendant Nancy Dunn Martin submits the following Memorandum in Support of her Motion for Summary Judgment.¹

FACTS

The Plaintiff, Country Properties, LLC ("Country Properties"), owns approximately 1023.07 acres, partly in Richland County (383.67 acres) and partly in Kershaw County (640.07 acres). The county line for Richland and Kershaw Counties is Raglins Creek, which runs through the Plaintiff's property. The Plaintiff purchased the 1,023.07 acre tract in 2009 from Pine Ridge Investments, LLC ("Pine Ridge Investments"). Jim Podell and Claude Campbell were the members of Country Properties at the time of the purchase. Sometime after the sale, Campbell sold his interest in Country Properties to Jim Podell's wife, Dorothy Podell. Claude Campbell died on February 18, 2015.

The Defendant, Nancy Dunn Martin ("Nancy Martin" or "the Defendant"), owns several tracts of land that share a boundary line (abut) with the Plaintiff. In total, Nancy Martin owns 276.11 acres, all of which are located in Richland County ("the Martin property"). A

¹ Nancy Martin denies that a deeded easement exists. For purposes of the arguments raised in this Memorandum in Support of her Motion for Summary Judgment, the issue of whether or not there is a deeded easement is irrelevant.

demonstrative exhibit is attached hereto as **Exhibit A.**² Exhibit A uses the Richland County Tax Assessor's information to show the approximate boundaries of the two properties, along with other items relevant to the dispute in this civil action.

The use of a dirt road through the Martin Property is the primary issue in this case. Northeast Shady Grove Road is a dirt road in Richland County with its terminus 2,914 feet from Highway 601. The terminus of Northeast Shady Grove Road is on the Martin Property. Richland County has placed an "End of County Maintenance" sign at the terminus of Northeast Shady Grove Road (approximate location shown on Exhibit A). Country Properties has three points of entry to its property off of two different public roads (Highway 601 and Old English Road). Notwithstanding the fact that Country Properties has three points of access/entry, Country Properties contends it is entitled to a fourth point of access to its property, through the middle of the Martin Property by using the private dirt road, which is Nancy Martin's only point of entry onto the Martin Property.

The Dunn's Mountain Hunting Club ("Dunn's Mountain") began leasing the Martin Property in 1970 for hunting. Dunn's Mountain leased the property continuously from 1970 until the fall of 2013. As part of its lease agreement, Dunn's Mountain maintained all of the dirt roads on the Martin Property, which included scraping the roads with a motor grader, repairing holes, and removing trees from the roads. (Glen Wessinger Dep. 19:22-20:25, Nov. 4, 2014).³ All roads on the Martin Property are dirt roads.

In 1970, members of Dunn's Mountain erected a gate (referred to herein as "the gate") on

² Nancy Martin and her sister, Dorothy Martin Tate, inherited a portion of tract 1, and tracts 2, 3, 4, 5 and 6 from their father, E.F. Martin, Jr., after he died in 2006. Dorothy Martin Tate deeded her interest in the Martin property to Nancy Martin on August 9, 2007, and Nancy Martin became the sole owner of the properties that she and her sister inherited from her father. Nancy Martin acquired a 65 acre tract in 2012, that was formerly owned by the Lewises; the Lewis tract was situated between the Martin Property and the Plaintiff's property. All of the property owned by Nancy Martin is referred to herein as the "Martin Property." The Martin property is shown on Exhibit A.

³ Deposition excerpts of Glen Wessinger are attached hereto as **Exhibit B.**

the Martin Property just beyond the terminus of Northeast Shady Grove Road (just beyond the "End of County Maintenance" sign) at the direction of E.F. Martin, Jr. Gary Wessinger and Glen Wessinger were members of Dunn's Mountain Hunting Club. Gary Wessinger is Glen's father and Gary actually installed the gate on the Martin Property in 1970. (Gary Wessinger Dep. 16:18-18:24, Nov. 4, 2104).⁴ The gate is a steel gate that blocks all vehicular traffic from passing beyond the gate on the dirt road through the Martin Property. A copy of a plat that shows the location of the gate is attached hereto as **Exhibit D**. This gate has been in its current location, located entirely on the Martin Property, since 1970, approximately 44 years before Plaintiff filed this action against Nancy Martin. The gate is currently locked and has been locked since it was erected. (Nancy Martin Dep. 22:15-23:2, Nov. 4, 2014).⁵ Any use of the private dirt road (referred to herein as "the dirt road") that runs through the Martin property has been with the permission of the owner of the Martin property.⁶

Richland County's records designate the end of the public road as being 2,914 feet from Highway 601 (Randy Byrd Dep., Page 13, lines 6 -10).⁷ Randy Byrd is the Right of Way Agent for Richland County and has been the Right of Way Agent since 1995 to present date. (Randy Byrd Dep., Page 7, lines 8 -16). The gate is located about 200 feet beyond the End of County Maintenance sign (Randy Byrd Dep., Pages 14-15, lines 24-18). Moreover, Richland County has designated this road in its own records, Richland County's Road Atlas, as being a private road. (Randy Byrd Dep., pages 25 -28, lines 19 - 14 and Exhibit 3 to Randy Byrd Deposition).

Multiple locks have been on the gate at various times over the past 45 years. The locks

⁴ Deposition excerpts of Gary Wessinger are attached hereto as **Exhibit C**.

⁵ Deposition excerpts of Nancy Martin are attached hereto as **Exhibit E**.

⁶ Nancy Martin's grandmother owned the property, through a life estate, until 1990 and then her father E.F. Martin, Jr. became the owner of the property.

⁷ Deposition excerpts of Randy Byrd, along with the exhibits to Randy Byrd's deposition are attached hereto as **Exhibit F**.

are connected with chain links to make one continuous chain. Over the years, various locks were placed on the gate either by the Martin family (E.F. Martin Jr., Nancy's father, and Nancy Martin) or by (1) the Martin family's forester (formerly David E. Jollay, currently Mark Paul Kays), (2) Santee Cooper and (3) Dunn's Mountain Hunting Club.⁸ Anyone using the road through the Martin Property was with the express permission of the owner(s) of the property, as explained in Gary Wessinger's deposition as follows:

Q: Okay. Do you know where Country Properties, LLC, Mr. Podell's company owns property adjacent to the Martin Property?

A: Well, I don't know where the actual lines are, but I know where the property is located.

Q: During the time that you were hunting the Martin property, did you ever see timber cuts take place on the adjacent property that's now owned by Mr. Podell's company?

A: Yes, sir.

Q: Do you know how the log trucks got in and out?

A: They made a deal with Mr. Martin and he let them use the road to go through his gate.

(Gary Wessinger Dep. 28: 3-15).

Q: Why do you think that they talked to Mr. Martin about that?

A: Because he told me that he had give them permission to use the road to haul logs out.

(Gary Wessinger Dep.28:23-29:1).

At times, additional locks appeared on the gate that the Martins could not identify, and the Martins, along with a Dunn's Mountain Hunting Club representative, would periodically

⁸ Dunn's Mountain had permission to maintain its own lock(s) on the gate and access the Martin Property by virtue of its lease. Nancy Martin decided in the fall of 2013 that she wanted to enjoy the use of the land instead of leasing the property to Dunn's Mountain Hunting Club. Since the Dunn's Mountain Hunting Club lease was not renewed, the Dunn's Mountain Hunting Club lock was removed from the gate, leaving three locks on the gate. (Glen Wessinger Dep. 18:3-14).

perform "lock cleanings" and remove them. Gary Wessinger can recall participating in at least six lock cleanings between 1970 and 2012:

Q: Did anybody use Northeast Shady Grove without Mr. Martin's permission during your tenure out there at Dunn's Mountain Hunting Club?

A: I'm sure they did because like I say, every once in a while we would have to have a lock cleaning. It would get so many on there, nobody know who they was, nobody would own up to them. And we would just take and put a new chain up, hang all the locks and stuff on the pine tree next to there and then they could come back and claim them if they wanted.

Q: You called it a lock cleaning?

A: Yeah.

Q: How many times do you think you did a lock cleaning on that gate?

A: When I was down there we probably done it at least six times.

Q: Between 1970 and 2012?

A: Yeah.

(Gary Wessinger Dep. 36:10-37:2).

Nancy or her father would post a sign on the gate, similar to the one pictured in Exhibit G, notifying the public that all unauthorized locks would be removed from the gate and fastened by wire to the gate so they may be reclaimed.

At some point when Plaintiff was considering purchasing the property in 2009 or after Plaintiff purchased the 1,023.07 acre tract, Mr. Podell obtained the combination for Pine Ridge Investment's lock from Mr. Brazell, and Plaintiff began using the dirt road across Nancy Martin's property as a fourth point of access to its property:

Q: How did your lock get on the gate?

- A: I put it there.
- Q: When did you put a lock on the gate?
- A: After we purchased the property, I replaced my lock with the lock we were using, which was one of the Brazell's lock. Excuse me.
- Q: Did you cut off the Brazell's lock?
- A: No.
- Q: Had the Brazell's lock already been removed—
- A: No.
- Q: --when you put your lock on?
- A: No.
- Q: Did you have a key to the Brazell's lock?
- A: It's a combination.
- Q: Did you have a combination to the Brazell's lock?
- A: Yes, Yes.
- Q: So you undid the Brazell's lock and you put in the link or tow of chain and you put your—
- A: No, I just put my lock in their place.
- Q: Okay. You pulled their lock off?
- A: Yes.
- Q: And put yours on there?
- A: Uh-huh.

(Podell Dep. 35:4-36:6, August 1, 2014).⁹

Mr. Podell and Mr. Campbell used Mr. Brazell's combination every time they entered the dirt

⁹ Deposition Excerpts of James Podell are attached hereto as Exhibit H.

road through the Martin's property.¹⁰

Q: Was the gate locked every time you went there?

A: I believe it was. I'd say yes.

(Claude Campbell Dep. 25:1-2, September 17, 2014).¹¹

Q: Did you always get in through that gate by using that combination lock?

A: Yeah.

(Campbell Dep. 26:8-10).

At some point, Plaintiff's lock was removed during one of the Martin's lock cleanings, and Plaintiff was no longer able to access Northeast Shady Grove Road.

For 44 years, Nancy Martin and her predecessors in title (E.F. Martin, Jr., Nancy Martin's father) continuously maintained a locked gate on their property beyond the "End of County Maintenance" sign on the dirt road. The dirt road extends beyond the gate and has at all times been a *private road* maintained exclusively by Nancy Martin's father and/or Nancy Martin. To the extent that there was any known use of the road by persons other than the Martin family and their guests between 1972 and the present date, the use was with the permission of either E.F. Martin, Jr. or Nancy Martin.

The Plaintiff claims it has a right to use the dirt road through the Martin Property, Nancy Martin's only point of entry, as a fourth point of access to its property because it has either an express or prescriptive easement and the gate is preventing Plaintiff's access. Plaintiff filed this action on March 18, 2014, asserting five causes of action against the Defendant, as follows: (1)

¹⁰ Claude Campbell testified he remembered using Northeast Shady Grove Road when he was about 8 or 10 years old (sometime between 1937 and 1939) to visit his great uncle and aunt, but this was before the gate was erected in 1970 and has no bearing on the legal analysis of this case. Campbell testified the only other times he accessed the road after 1940 was around the time of the 2009 purchase and was through the use of Brazell's combination lock (Campbell Dep. 8:13-10:4; 30:5-11).

¹¹ Deposition excerpts of Claude Campbell attached hereto as Exhibit I.

easement by grant, (2) prescriptive easement, (3) seeking permanent injunction against Nancy Martin from "blocking or obstructing" Shady Grove Road due to easement by grant, (4) seeking permanent injunction against Nancy Martin from "blocking or obstructing" Shady Grove Road due to prescriptive easement and (5) the dirt road through Nancy Martin's property (referred to as "Shady Grove Road" by the Plaintiff) is a public road and the property owners along the road have dedicated the road to public use. For the reasons set forth herein, the Defendant is entitled to Summary Judgment on all of Plaintiff's causes of action.

STANDARD

"The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Matsell v. Crowfield Plantation Cmty. Servs. Ass'n, Inc.*, 393 S.C. 65, 70, 710 S.E.2d 90, 93 (Ct. App. 2011) (citing *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC; *Quality Towing, Inc. v. City of Myrtle Beach*, 340 S.C. 29, 530 S.E.2d 369 (2000). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Hancock v. Mid-S. Mgmt. Co., Inc.*, 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009). "Once the moving party carries its initial burden, the 'opposing party must, under Rule 56(e), 'do more than simply show that there is some metaphysical doubt as to the material facts' but 'must come forward with specific facts showing that there is a genuine issue for trial.'"" *Hedgepath v. American Telephone and Telegraph Company*, 348 S.C. 340, 559 S.E.2d 327, 335 (Ct. App. 2002) (citations omitted).

ARGUMENT

I. Plaintiff does not possess a prescriptive easement.

Plaintiff can present no evidence creating a genuine factual issue as to whether the use of the right-of-way was “adverse” or under “claim of right” for the requisite 20 years. To the contrary, all of the evidence shows that the Plaintiff’s use of the road was entirely permissive. Therefore, Plaintiff’s claim of prescriptive easement fails as a matter of law and must be dismissed.

An easement is a right given to a person to use the land of another for a specific purpose. *Murrells Inlet Corp. v. Ward*, 378 S.C. 225, 232, 662 S.E.2d 452, 455 (Ct. App. 2008). “An easement may arise in three ways: (1) by grant; (2) from necessity; and (3) by prescription.” *Kelley v. Snyder*, 396 S.C. 564, 572, 722 S.E.2d 813, 817 (Ct. App. 2012). “A prescriptive easement is not implied by law but is established by the conduct of the dominant tenement owner.” *Boyd v. BellSouth Tel. Tel. Co.*, 369 S.C. 410, 419, 633 S.E.2d 136, 141 (2006). To establish a prescriptive easement, one must show: (1) continued and uninterrupted use or enjoyment of the right for a period of twenty years; (2) the identity of the thing enjoyed; and (3) use or enjoyment which is either adverse or under claim of right. *Bundy v. Shirley*, No. 2013-001263, 2015 WL 2088551, at 5 (S.C. May 6, 2015) (citing *Pittman v. Lowther*, 363 S.C. 47, 50, 610 S.E.2d 479, 480 (2005)). “[A] party claiming a prescriptive easement has the burden of proving all elements by clear and convincing evidence.” *Id.*

It is well established that “evidence of permissive use defeats the establishment of a prescriptive easement because use that is permissive cannot also be adverse or under a claim of right.” *Bundy* at 9. Stated another way, when a claimant uses property with the permission of

the owner, he or she acknowledges the owner's rights and uses the property without an affirmative, hostile act toward the owner's rights." *Bundy* at 9.

Bundy v. Shirley is a strikingly similar case in which the Supreme Court recently applied the principal of permissive use. In *Bundy*, the Court held the claimant's claim of a permissive easement was defeated because the property owner gave the claimant a key to unlock the cable that blocked the road and later gave him permission to construct a gate on the property in the same location as the cable, making the claimant's use of the disputed road entirely permissive. It was not until the property owner revoked the claimant's permission to use the road did the claimant claim he had a right to use the disputed road or affirmatively act in a manner hostile to the owner's rights. *Bundy* at 9.

Like *Bundy*, the installation of the gate in this case implies permission is required to access the property. Nancy Martin and her predecessor in interest granted permission by allowing others to gain access through the use of a key or combination lock. Those whose locks could not be identified or belonged to others without the Martin's express permission were removed from the gate on at least six different occasions between 1970 and 2014.

There is no evidence that the Plaintiff or its predecessor in interest made any distinct and positive assertion of a right hostile to the Martins after the gate was erected on the Martin Property. Therefore, Plaintiff's use of the road has never been adverse or under a claim of right, but merely permissive.

Moreover, even if Plaintiff's use could be characterized as adverse or under claim of right, there is no evidence showing such intent on the part of all previous owners of the Plaintiff's property dating back 20 years. Plaintiff owned the 1,023.97 acre tract for five years before commencing this action. Plaintiff replaced the Pine Ridge combination lock with its own

lock after it purchased the property in 2009, and Nancy Martin had it removed that same year. Plaintiff has not used Northeast Shady Grove Road since its lock was removed. Therefore, to withstand summary judgment Plaintiff must provide a scintilla of evidence that its predecessor, Pine Ridge Investments, continuously used Northeast Shady Grove Road for an uninterrupted twenty year period before 2009. Notably, permission to access the gate would constitute an interruption in use. Nevertheless, because there is not even a scintilla of evidence that can establish continuous adverse use of the disputed road for twenty years, Plaintiff's claim for prescriptive easement cannot withstand summary judgment and must be dismissed as a matter of law.

II. Statute of Limitations

Defendant is entitled to summary judgment because Plaintiff's claims, if any, are barred by the statute of limitations pursuant to S.C. Code § 15-3-380, S.C. Code § 15-3-360, and S.C. Code § 15-3-340.

The statute of limitations begins to run at the time the cause of action accrues. *Harvey v. S.C. Dep't. of Corr.*, 338 S.C. 500, 508, 527 S.E.2d 765, 769 (Ct. App. 2000) (citing *Matthews v. City of Greenwood*, 305 S.C. 267, 269, 407 S.E.2d 668, 669 (Ct. App. 1991)). "Thus, a particular cause of action accrues at the moment when the plaintiff has a legal right to sue on it." *King v. James*, 388 S.C. 16, 25-26, 694 S.E.2d 35, 40 (Ct. App. 2010). "An assignee may not maintain a claim if a statute of limitations defense would have been effective if the same claim had been brought by the assignor. Thus, if a claim was barred by the statute of limitations at the time of the assignment, the assignee may not assert the claim. A subrogee of a time-barred claim is similarly barred." 54 C.J.S. Limitations of Actions § 40.

"Statutes of limitations are not simply technicalities." *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). "One purpose of a statute of limitations is 'to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights.'" *Id.* (quoting *McKinney v. CSX Transp., Inc.*, 298 S.C. 47, 49-50, 378 S.E.2d 69, 70 (Ct. App. 1989)); see also *Transp. Ins. Co. & Flagstar Corp. v. S. Carolina Second Injury Fund*, 389 S.C. 422, 428, 699 S.E.2d 687, 690 (2010); *Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 618, 698 S.E.2d 879, 883 (Ct. App. 2010). Plaintiff's claim is barred by three distinct statute of limitations, S.C. Code § 15-3-380, S.C. Code § 15-3-360 and S.C. Code § 15-3-340.

A. S.C. Code § 15-3-380

Plaintiff is barred from pursuing its claims by virtue of S.C. Code § 15-3-380, which provides as follows:

No action shall be commenced in any case for the recovery of real property or for any interest therein against a person in possession under claim of title by virtue of a written instrument unless the person claiming, his ancestor or grantor, was actually in the possession of the same or a part thereof within forty years from the commencement of such action. And the possession of a defendant, sole or connected, pursuant to the provisions of this section shall be deemed valid against the world after the lapse of such a period.

This statute is a statute of limitations upon an action for the recovery of any interest in real property and expressly gives good title. Of the three limitations statutes that apply, § 15-3-380 is the most liberal and allows for the longest limitations period, requiring the plaintiff to commence an action within forty years from the time Plaintiff last accessed the disputed road as a matter of right.

Here, Defendant holds legal title to property which Plaintiff seeks an interest in, i.e. Plaintiff is seeking an easement over the Martin property. There is no question of fact that

neither Plaintiff, nor its predecessor accessed the dirt road through the Martin's property as a matter of right at least from the time the gate across Northeast Shady Grove Road was installed and locked in 1970. Plaintiff obtained access to the gate by obtaining the code to the combination lock belonging to its predecessor in interest, Carl Brazell, one of the principal members of Pine Ridge Investments. The use of a locked gate indicates that permission is necessary to use the road. *See Bundy v. Shirley*, No. 2013-001263, 2015 WL 2088551 (S.C. May 6, 2015), and therefore there can be no claim of title.

At minimum, any right of action by the Plaintiff and/or its predecessors in title should have been commenced against Defendant on, or before, 2010 because the Martin's installation of the gate in 1970 "started the clock." Plaintiff filed this action against Nancy Martin on March 18, 2014. Therefore, to the extent that the plaintiff may have had any rights in the dirt road, Defendant's possession of the dirt road became valid against the world in 2010 *at the latest*, and Plaintiff's causes of action must be dismissed as a matter of law.

B. S.C. Code § 15-3-360

Plaintiff is also barred from pursuing its claims pursuant to S.C. Code § 15-3-360, which provides as follows:

No entry upon real estate shall be deemed sufficient or valid as a claim unless an action be commenced thereupon within one year after the making of such entry and within ten years from the time when the right to make such entry descended or accrued.

Plaintiff commenced this action on March 18, 2014. Therefore, under S.C. Code § 15-3-360, Plaintiff's action may only be maintained if it (1) accessed the road as a matter of right on or after March 18, 2013 and (2) was possessed of the right to access Northeast Shady Grove Road on Plaintiff's property within ten years of March 18, 2014 (on or after March 18, 2004).

The last time Mr. Podell and Mr. Campbell accessed Northeast Shady Grove Road

through the Martin's property was before their lock was removed in 2009. Setting aside the fact that access was not as a matter of right because Plaintiff's use was permissive, at the latest, Plaintiff should have filed its lawsuit on or before 2010 to satisfy the first requirement of § 15-3-360. And even assuming Plaintiff did so, Plaintiff's action is still barred because this action was commenced more than ten years from the time when Plaintiff's right to use the disputed road accrued. Because the gate was erected beyond the terminus of Northeast Shady Grove Road no later than 1970 (the last year Plaintiff could have used the road without permission), any right of action by the Plaintiff and/or its predecessors in title should have been commenced against Nancy Martin's predecessor in title (E.F. Martin, Jr.) on, or before, 1980.

As such, Plaintiff's, along with Plaintiff's predecessors in title, failure to exercise reasonable diligence and pursue its claims against Defendant bars Plaintiff from maintaining the causes of action against Nancy Martin that relate to Plaintiff's right to use or access the dirt road through Defendant's property.

C. S.C. Code § 15-3-340

Finally, as an action for the recovery of real property, this action is also governed by S.C. Code § 15-3-340, which states that an action for the recovery of real property may not be maintained "unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within ten years before the commencement of the action." S.C. Code Ann. § 15-3-340 (emphasis added); *Portside Owners Ass'n, Inc. v. S. Beach Racquet Club, Inc.*, No. 2008-UP-153, 2008 WL 9837329 (S.C. Ct. App. Mar. 11, 2008).

As discussed previously, at no time was Plaintiff or its predecessor in interest "in possession" of an easement over the Martin Property because neither accessed the road as a matter of right after the gate was erected in 1970. The only evidence before the Court is

testimony that Pine Ridge Investments, LLC had permission from E.F. Martin, Jr. to access the gate through the use of a combination lock at one point, and that Carl Brazell gave Mr. Podell the combination to that lock after Mr. Podell purchased the property in 2009. To satisfy the limitations period under S.C. Code § 15-3-340, Plaintiff would have to prove it or Pine Ridge Investments used Northeast Shady Grove Road as a matter of right anytime after March 18, 2004.

Permission cannot and does not amount to "possession" within the meaning of the statute. There is no evidence before the Court that Plaintiff possesses a deeded easement or that Plaintiff or its predecessor ever accessed the road without permission or without the use of the combination lock that Mr. Martin allowed. The testimony is undisputed. Only those with permission from the Martin family were allowed to place a lock on the gate. The Martins would remove any unidentified locks on a regular basis. Mr. Podell testified he replaced Mr. Brazell's combination lock with his own lock when he purchased the 1023.7 acre tract in 2009, and his lock was removed that same year. The earliest Plaintiff, or its predecessor in title, could have used the road as a matter of right (without permission) was before the gate was erected in 1970. Therefore, pursuant S.C. Code § 15-3-340, the statute of limitations ran in 1980, and Plaintiff's claims are barred as a matter of law.

III. To the extent Plaintiff had an easement (deeded, prescriptive or otherwise) to access the dirt road, the easement is now owned by Nancy Martin by virtue of adverse possession.

The party asserting adverse possession must show continuous, hostile, open, actual, notorious, and exclusive possession for a certain period of time. *Mullis v. Winchester*, 237 S.C. 487, 491, 118 S.E.2d 61, 63 (1961). In South Carolina, adverse possession may be established if the elements of the claim are shown to exist for at least ten years. S.C. Code Ann. § 15-67-210;

Jones v. Leagan, 384 S.C. 1, 10, 681 S.E.2d 6, 11 (Ct. App. 2009). A private easement may be lost by adverse possession. *Outlaw v. Moise*, 222 S.C. 24, 71 S.E.2d 509 (1952). The act of “locking out” the Plaintiff and the Plaintiff’s predecessors in interest is an act of Adverse Possession/Reverse Prescription. *Bowen v. Team*, 40 S.C.L. 298 (S.C. App. L. 1853) (holding that an obstruction of a right way (an easement) has the effect of terminating the easement); *Kelly v. Snyder*, 396 S.C. 564, 722 S.E.2d 813 (Ct. App. 2012) (holding the defendant established a prescriptive easement over the road through the plaintiff’s property by adverse use and by claim of right where the defendant erected a gate on the easement to prevent other people from using it). In other words, once an easement has been created, if the servient owners then start requiring permission to use that easement, as Defendant has in this case by installing a gate, that requirement is indicative of a measure of control over the easement that is adverse to the enjoyment of easement by the dominant owners. *Hudson v. Pillow*, 261 Va. 296, 541 S.E.2d 556 (2001).

Defendant’s ownership and possession of the dirt road beyond the terminus of Northeast Shady Grove Road satisfies the elements of adverse possession. Defendant’s possession of Plaintiff’s easement, to the extent Plaintiff was entitled to one, was hostile, open, actual and notorious. Defendant’s act of installing a locked gate across the dirt road just beyond the terminus of Northeast Shady Grove Road in 1970 and controlling who had access to that gate was adverse and wholly inconsistent with Plaintiff’s claimed right to use the road. Dunn’s Mountain Hunting Club maintained the road at the direction of the Martin family, and Nancy Martin identified the dirt road as “Black Dog Road” in 2010. (Nancy Martin Dep. 5:18-6:5). Since 1970, Defendant and her predecessors in interest used the dirt road beyond the terminus of Northeast Shady Grove Road without anyone intervening in such use, erected a gate on

Plaintiff's purported easement to prevent other people from using it, and controlled who had access to the road by only offering certain people permission to maintain a lock on the gate. There is no issue of fact that Defendant's actions were sufficiently hostile, open, actual and notorious.

Furthermore, Defendant's possession was also continuous for at least 44 years. Nancy Martin has testified that there was a locked gate across the dirt road beyond the terminus of Northeast Shady Grove Road since the time she first visited the Martin property in 1970 or 1971, and that the gate has been locked ever since. (Nancy Martin Dep. 22:15-23:2). Gary and Glen Wessinger also testified that the gate has been locked continuously since it was erected:

Q: Has that gate been locked continuously from 1969 to the present date that you know of?

A: That road has, yes, sir.

(Gary Wessinger Dep. 34: 6-8).

Q: But as far back as you can remember, being five or six years old, do you remember the gate being locked?

A: Yes, sir. It was locked. It has been locked.

(Glen Wessinger Dep. 19:19-21).

There is no evidence that the gate was ever open to the public after 1970, and the fact that the gate was continuously locked is undisputed.

Q: All right. Do you have any direct knowledge of this being a publically-maintained road?

A: No, I do not.

(James Guy Dep. 55: 5-7, April 10, 2015).¹² As such, Defendant has adversely possessed any right-of-way Plaintiff was ever potentially entitled to over the Martin's property by both claim of right and adverse use. Therefore, Plaintiff's claims are defeated and barred as a matter of law.

IV. Defendant did not expressly or impliedly dedicate the dirt road beyond the terminus of Northeast Shady Grove Road as a public road.

Because neither Defendant nor her predecessor in interest expressly or impliedly dedicated the dirt road as a public road, Plaintiff is not entitled to a declaratory judgment from the Court declaring that the plaintiff has a right to use the road because of its public character.

Dedication requires two elements: (1) the owner must express in a positive and unmistakable manner the intention to dedicate his property to public use, and (2) there must be, within a reasonable time, an express or implied public acceptance of the property offered for dedication. *Horry County v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993); *Helsel v. City of North Myrtle Beach*, 307 S.C. 24, 413 S.E.2d 821 (1992). Even though a landowner must positively and unmistakably express his or her intention to dedicate property, the intent to dedicate may be implied from allowing lengthy public use of the land. *Cleland v. Westvaco Corp.*, 314 S.C. 508, 431 S.E.2d 264 (Ct. App. 1993).

Dedication is an exceptional mode of passing an interest in land, and proof of dedication must be strict, cogent, and convincing. The acts proved must not be consistent with any construction other than that of a dedication, and dedication may not be implied from the permissive, sporadic, and recreational use of property. The record must contain evidence the owner of the property clearly, convincingly, or unequivocally intended to dedicate the property for public use. *Id.*

As with intention to dedicate, no formal acceptance by a public authority is necessary to

¹² Deposition of James Guy attached hereto as Exhibit J.

show public acceptance. Acceptance may be implied by the public or a public authority continuously using or repairing the property. Also, acceptance and dedication may be demonstrated by a governmental authority not assessing taxes on the land. *Mack v. Edens*, 320 S.C. 236, 464 S.E.2d 124 (Ct. App. 1995) (Evidence supported neither intent by landowners to dedicate road nor public acceptance of property and, thus, failed to prove implied dedication of road; historical public use of dirt road was for recreational or religious purposes, public authorities had not maintained road, road was not excluded from landowners' tax assessment, and landowners' deeds did not delineate public road).

Here, there is no question there is no express dedication in this case. The road was never excluded from the tax assessment on the property, and none of the deeds on the property delineate Northeast Shady Grove Road as a public road. Instead, Plaintiff claims there is an implied dedication because "the act of scraping and maintaining Shady Grove Road by Richland County and Kershaw County demonstrates a public acceptance of the dedication of the road." (Compl. ¶25) However, there is no evidence, from any source, that establishes either Richland County or Kershaw County maintained Northeast Shady Grove Road. James Guy's¹³ deposition has been taken in this case and he testified as follows:

Q: All right. Do you have any direct knowledge of this being a publicly-maintained road?

A: No, I do not.

(Guy Depo: 55:5-7).

Q: Do you have any personal knowledge about that road being maintained by any county?

A: No.

¹³ James Guy owns property to the north and east of Country Properties and purportedly had knowledge about county maintenance of these roads.

Q: And that's Richland County or Kershaw County. You don't know if the maintained any part of that road, do you?

A: To say no, I don't.

(Campbell Dep. 26: 19-25).

In fact, it would be impossible for the counties to maintain Northeast Shady Grove Road on the Martin Property; it is undisputed that public access to Northeast Shady Grove Road has been blocked by a locked gate since 1970. In fact, a sign is posted on the road just before the locked gate and where the Martin property begins that reads: "End of Richland County Maintenance." (A photo of the sign is attached hereto as **Exhibit K**). A letter from Richland County Public Works also confirms Richland County does not maintain the road. (See **Exhibit F**). Moreover, Glen Wessinger testified that the road has been maintained by Dunn's Mountain Hunting Club, not the county:

Q: And as far as you know, the end of county maintenance side is where the county maintenance stops?

A: Yeah, where the sign is up at the old house.

Q: And Dunn's Mountain Hunting Club has maintained that road on the Martin property?

A: From ever as far as I'm concerned, my whole life.

(Glen Wessinger Dep. 25:15-20).

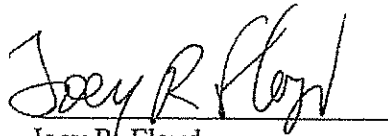
Because Plaintiff cannot point to even an scintilla of evidence that either Richland County or Kershaw County maintained Northeast Shady Grove Road on the Martin property, and because all evidence before the Court proves the contrary, there is no genuine issue of material fact that Northeast Shady Grove Road is a private road and was never expressly or impliedly dedicated as public road.¹⁴ Therefore, Plaintiff's Complaint must be dismissed as a matter of

¹⁴ Notably, Plaintiff continues to maintain the position that the entire dirt road is public despite the fact that it

law.

CONCLUSION

Based upon the undisputed testimony and evidence there is no question of material fact that Plaintiff's use of the dirt road across the Defendant's property has always been permissive, that no deeded easement exists and the dirt road is not publically maintained or impliedly dedicated for public use. Therefore, the Defendant's Motion for Summary Judgment should be GRANTED and Plaintiff's Complaint be DISMISSED with prejudice.



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(803) 252-7693
*Attorneys for the Defendant,
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¹⁴
September 18, 2015

Alexander M. Sanders, Jr.
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(843) 953-5755
*Attorney for the Defendant,
Nancy Dunn Martin*

maintains a locked gate just beyond the property line that separates the Martin Property from Country Properties, LLC's property.

Baxley, Pratt & Wells, P.A.

Attorneys at Law

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REX K. PRATT
(1929-1999)

November 5, 2015

Joey R. Floyd, Esquire
PO Box 61110
Columbia, SC 29260-1110

Dear Joey:

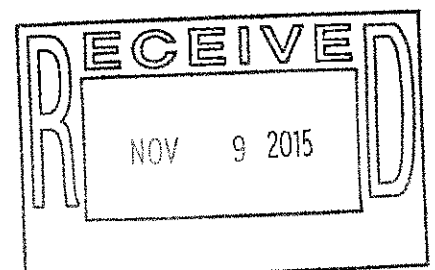
Please find enclosed the Order Denying Motion for Summary Judgment.

Very truly yours,

BAXLEY, PRATT & WELLS, P.A.

John W. Wells

enclosed
JWW/JC



STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	Civil Action No.: 2014-CP-40-1805
Country Properties, LLC,	)	
Plaintiff,	)	
	)	
vs.	)	ORDER DENYING MOTION
	)	FOR SUMMARY JUDGMENT
Nancy Dunn Martin,	)	
Defendant.	)	

This action is one brought by the Plaintiff to establish his right to use Northeast Shady Grove Road as it proceeds through the lands of the Defendant under various theories including the theory that he has a prescriptive easement over the road and the theory that that road is a public road. The Defendant filed a Motion for Summary Judgment under Rule 56 SCRPC asserting that she is entitled to judgment as a matter of law because the undisputed facts in this case require a judgment for the Defendant.

A hearing was held on October 27, 2015. Joey R. Floyd appeared and argued the Motion for the Defendant. John W. Wells appeared and argued against the Motion for the Plaintiff.

After vigorous arguments were made by both parties supporting their respective positions, I concluded as a matter of law that the factual issues relevant to the establishment or the defeat of a prescriptive easement or a right to use a road because it is a public road are in dispute. I conclude as a matter of law that the facts necessary to establish an easement by prescription or a public road are sufficiently in dispute to deny the Motion for Summary Judgment and to set this case for trial. I conclude as a matter of law that the outcome of this case, like most prescriptive easement cases, will

be determined by its facts, and that those facts are in dispute. Therefore, the Defendant's Motion for Summary Judgment is denied.

AND IT IS SO ORDERED.

The Honorable Joseph M. Strickland

Columbia, SC

Date: _____

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Country Properties, LLC,

Plaintiff,

vs.

Nancy Dunn Martin,

Defendant.

IN THE COURT OF COMMON PLEAS

Civil Action No.: 14-CP-40-1805

**DEFENDANT NANCY DUNN
MARTIN'S PRE-TRIAL BRIEF**

2016 MAR 18 AM 10:46
JIM PODELL
CLAUDE CAMPBELL
COUNTRY PROPERTIES, LLC

FACTS

In this action, the Plaintiff seeks an additional (a 4th) access point to its 1,023 acre tract of land. The Plaintiff claims this right of access through multiple legal theories: (1) easement by express grant, (2) prescriptive easement, (3) seeking permanent injunction against Nancy Martin from “blocking or obstructing” Shady Grove Road due to easement by grant, (4) seeking permanent injunction against Nancy Martin from “blocking or obstructing” Shady Grove Road due to prescriptive easement and (5) the dirt road through Nancy Martin’s property (referred to as “Shady Grove Road” by the Plaintiff) is a public road and the property owners along the road have dedicated the road to public use. The Defendant denies the Plaintiff’s claims, has asserted a number of defenses and has filed a counterclaim for adverse possession.

The Plaintiff, Country Properties, LLC (“Country Properties”), owns 1,023.07 acres, partly in Richland County (383.67 acres) and partly in Kershaw County (640.07 acres). Raglins Creek, which runs through the Plaintiff’s property, is the border between Richland County and Kershaw County. The Plaintiff purchased the 1,023.07 acre tract in 2009 from Pine Ridge Investments, LLC (“Pine Ridge Investments”). Jim Podell and Claude Campbell were the members of Country Properties at the time of the purchase. Sometime after the sale, Campbell sold his interest in Country Properties to Jim Podell’s wife, Dorothy Podell. Claude Campbell

died on February 18, 2015.

The Defendant, Nancy Dunn Martin (“Nancy Martin” or “the Defendant”), owns several tracts of land that abut the Plaintiff’s property. Nancy Martin owns 276.11 acres, all of which are located in Richland County (“the Martin property”). A demonstrative exhibit of the properties involved in the dispute is attached as **Exhibit A**.¹ Exhibit A is the Richland County GIS Department’s tax map showing the approximate boundaries of the Plaintiff’s property, Ms. Martin’s property, other parcels and landmarks relevant to the dispute in this civil action.

Plaintiff’s demand to use a dirt road through the Martin Property as a fourth access to its 1,023 acre tract is the primary issue in this case. Northeast Shady Grove Road is a dirt road in Richland County with its terminus 2,914 feet from Highway 601 (shown as End of County Maintenance on Exhibit A). The terminus of Northeast Shady Grove Road is on the Martin Property, where Richland County has placed an “End of County Maintenance” sign. (the approximate location is shown on Exhibit A). Country Properties can already access its property at three points of entry from two different public roads (Highway 601 and Old English Road). Even though Country Properties has three points of access/entry to its property, Country Properties demands a fourth point of access to its property, through the middle of the Martin Property by way of a gated private dirt road, which is Nancy Martin’s only point of entry onto the Martin Property.

The Dunn’s Mountain Hunting Club (“Dunn’s Mountain”) continuously leased the Martin Property for hunting from 1970 until the fall of 2013. As part of its lease, Dunn’s Mountain maintained all of the dirt roads on the Martin Property. The maintenance included

¹ Nancy Martin and her sister, Dorothy Martin Tate, inherited portions of the 276 acres from their father, E.F. Martin, Jr., after he died in 2006. On August 9, 2007, Dorothy Martin Tate deeded her interest in the Martin property to Nancy Martin. Nancy Martin acquired an adjacent 65 acre tract in 2012, that was formerly owned by the Lewises. The Lewis tract was situated between the Martin Property and the Plaintiff’s property. All of the property owned by Nancy Martin is referred to herein as the “Martin Property.” The Martin property is shown on Exhibit A.

scraping the roads with a motor grader, repairing holes, and removing trees from the roads. All roads on the Martin Property are dirt roads.

The road through the Martin tract has been closed with a locked gate since 1970, when members of Dunn's Mountain erected a gate ("the gate") on the Martin Property just beyond the terminus of Northeast Shady Grove Road (just beyond the "End of County Maintenance" sign) at the direction of E.F. Martin, Jr. (the landowner). Gary Wessinger and Glen Wessinger are/were members of Dunn's Mountain and Gary installed the gate on the Martin Property in 1970. (Gary Wessinger Dep. 16:18-18:24, Nov. 4, 2104). The gate is a steel gate that blocks all vehicular traffic from passing beyond the gate on the dirt road through the Martin Property. A copy of a plat that shows the location of the gate is attached as **Exhibit B**. This locked gate has been in its current location, entirely on the Martin Property, since 1970, approximately 44 years before Plaintiff filed this action against Nancy Martin. The gate is currently locked and has been locked since it was erected. (Nancy Martin Dep. 22:15-23:2, Nov. 4, 2014). Any use of the private dirt road (referred to herein as "the dirt road") that runs through the Martin property has been with the permission of the owner of the Martin property (either Nancy Martin or her father).

It is undisputed that Richland County's ownership of Northeast Shady Grove Road is 2,914 feet east of Highway 601 (Randy Byrd Dep., Page 13, lines 6 -10). Randy Byrd is the Right of Way Agent for Richland County and has been the Right of Way Agent since 1995. (Randy Byrd Dep., Page 7, lines 8 -16). The gate is located about 200 feet beyond the End of County Maintenance sign (Randy Byrd Dep., Pages 14-15, lines 24-18). Richland County's Road Atlas designates the road beyond the End of County Maintenance sign as being a private road. (Randy Byrd Dep., pages 25 -28, lines 19 – 14 and Exhibit 3 to Randy Byrd Deposition).

Multiple locks were attached to the gate at various times over the past 45 years with the

permission of the Martins. The locks are connected with chain links to make one continuous chain. The various locks were placed on the gate either by the Martin family (E.F. Martin Jr., Nancy's father, and Nancy Martin) or by (1) the Martin family's forester (formerly David E. Jolley, currently Mark Paul Kays), (2) Santee Cooper and (3) Dunn's Mountain Hunting Club.² The Martins required anyone using the road through the Martin Property to have the permission, as explained in Gary Wessinger's deposition as follows:

Q: Okay. Do you know where Country Properties, LLC, Mr. Podell's company owns property adjacent to the Martin Property?

A: Well, I don't know where the actual lines are, but I know where the property is located.

Q: During the time that you were hunting the Martin property, did you ever see timber cuts take place on the adjacent property that's now owned by Mr. Podell's company?

A: Yes, sir.

Q: Do you know how the log trucks got in and out?

A: They made a deal with Mr. Martin and he let them use the road to go through his gate.

(Gary Wessinger Dep. 28: 3-15).

Q: Why do you think that they talked to Mr. Martin about that?

A: Because he told me that he had give them permission to use the road to haul logs out.

(Gary Wessinger Dep.28:23-29:1).

At times, additional locks appeared on the gate that the Martins could not identify, and the Martins, along with a Dunn's Mountain Hunting Club representative, would periodically

² Dunn's Mountain had permission to maintain its own lock(s) on the gate and access the Martin Property by virtue of its lease. Nancy Martin decided in the fall of 2013 that she wanted to enjoy the use of the land instead of leasing the property to Dunn's Mountain Hunting Club. Since the Dunn's Mountain Hunting Club lease was not renewed, the Dunn's Mountain Hunting Club lock was removed from the gate, leaving three locks on the gate. (Glen Wessinger Dep. 18:3-14).

perform "lock cleanings" and remove them. Gary Wessinger can recall participating in at least six lock cleanings between 1970 and 2012:

Q: Did anybody use Northeast Shady Grove without Mr. Martin's permission during your tenure out there at Dunn's Mountain Hunting Club?

A: I'm sure they did because like I say, every once in a while we would have to have a lock cleaning. It would get so many on there, nobody know who they was, nobody would own up to them. And we would just take and put a new chain up, hang all the locks and stuff on the pine tree next to there and then they could come back and claim them if they wanted.

Q: You called it a lock cleaning?

A: Yeah.

Q: How many times do you think you did a lock cleaning on that gate?

A: When I was down there we probably done it at least six times.

Q: Between 1970 and 2012?

A: Yeah.

(Gary Wessinger Dep. 36:10-37:2).

Prior to cutting the locks/performing a lock cleaning, Nancy or her father would post a sign on the gate, similar to the one pictured in **Exhibit C**, stating that they would remove all unauthorized locks from the gate.

At some point when Plaintiff was considering purchasing the 1023 tract, in 2009 or after Plaintiff purchased the 1,023.07 acre tract, Mr. Podell obtained the combination for Pine Ridge Investment's lock from Mr. Brazell, and Plaintiff began using the dirt road across Nancy Martin's property as a fourth point of access to its property.

Q: How did your lock get on the gate?

A: I put it there.

Q: When did you put a lock on the gate?

A: After we purchased the property, I replaced my lock with the lock we were using, which was one of the Brazell's lock. Excuse me.

Q: Did you cut off the Brazell's lock?

A: No.

Q: Had the Brazell's lock already been removed—

A: No.

Q: --when you put your lock on?

A: No.

Q: Did you have a key to the Brazell's lock?

A: It's a combination.

Q: Did you have a combination to the Brazell's lock?

A: Yes, Yes.

Q: So you undid the Brazell's lock and you put in the link or tow of chain and you put your—

A: No, I just put my lock in their place.

Q: Okay. You pulled their lock off?

A: Yes.

Q: And put yours on there?

A: Uh-huh.

(Podell Dep. 35:4-36:6, August 1, 2014).

Up until the point their LLC purchased the property, Mr. Podell and Mr. Campbell used Mr.

Brazell's combination every time they entered the dirt road through the Martin's property:³

Q: Was the gate locked every time you went there?

A: I believe it was. I'd say yes.

(Claude Campbell Dep. 25:1-2, September 17, 2014).

Q: Did you always get in through that gate by using that combination lock?

A: Yeah.

(Campbell Dep. 26:8-10).

At some point, Plaintiff's lock was removed during one of the Martin's lock cleanings, and Plaintiff was no longer able to access Northeast Shady Grove Road. Country Properties did not ask Defendant for permission to use the road prior to purchasing the 1,023 acre tract. But, after Country Properties purchased the property, Mr. Podell asked for a key to the locked gate. (James Podell Dep. 124:11-12, August 1, 2014)

For 44 years, Nancy Martin and her father kept the gate to their property locked to exclude everyone without their permission from accessing their property. The dirt road extends beyond the gate and has at all times been a private road maintained exclusively by Nancy Martin's father and/or Nancy Martin. To the extent that there was any known use of the road by persons other than the Martin family and their guests between 1972 and the present date, the use was with the permission of either E.F. Martin, Jr. or Nancy Martin.

MATTERS IN CONTROVERSY

The Plaintiff seeks a judicial determination that it has an easement through Nancy Martin's property for a fourth access point to its property. The Plaintiff filed this action on

³ Claude Campbell testified he remembered using Northeast Shady Grove Road when he was about 8 or 10 years old (sometime between 1937 and 1939) to visit his great uncle and aunt, but this was before the gate was erected in 1970 and has no bearing on the legal analysis of this case. Campbell testified the only other times he accessed the road after 1940 was around the time of the 2009 purchase and was through the use of Brazell's combination lock (Campbell Dep. 8:13-10:4; 30:5-11).

March 18, 2014, asserting five theories that allegedly allow it to traverse Ms. Martin's property through the locked gate: (1) easement by express grant, (2) prescriptive easement, (3) a permanent injunction against Nancy Martin from "blocking or obstructing" Shady Grove Road due to easement by grant, (4) a permanent injunction against Nancy Martin from "blocking or obstructing" Shady Grove Road due to prescriptive easement and (5) that the dirt road through Nancy Martin's property (referred to as "Shady Grove Road" by the Plaintiff) is a public road dedicated to public use. The Defendant denies that the Plaintiff has an easement of any type to use her road and denies that the road has been dedicated for public use. Additionally, should this Court find that the Plaintiff did, at one point in time, have an easement across the Defendant's property, the Defendant can prove extinguishment of any easement through adverse possession.

LEGAL ISSUES INVOLVED

A. Deeded Right of Access

The Plaintiff claims an express easement in its chain of title was granted in the deed from John H. Miller to Osee M. Martin dated November 18, 1918 and the deed from Matties Le C Desportes, J.H. Miller and Ella J. Miller to Lur Mae Kirkland dated December 21, 1926. The Defendant disputes that these deeds granted an express easement through her land because the tracts identified in the above-referenced deeds are not in Nancy Martin's chain of title. Furthermore, even if an express easement was granted, the Defendant's, and her predecessors in interest's, actions over the last 46 years have extinguished that easement through adverse possession.

B. Permanent Prescriptive Easement

A permanent prescriptive easement is not implied by law. *Bundy v. Shirley*, 412 S.C. 292, 304, 772 S.E.2d 163, 169 (2015). It is established by the conduct of the dominant estate.

Id. Under South Carolina law, to establish a prescriptive easement the party claiming an easement must show, by clear and convincing evidence, (1) continued and uninterrupted use or enjoyment of the right for a period of twenty years; (2) the identity of the thing enjoyed; and (3) use or enjoyment which is either adverse or under a claim of right. *See id* at 304, 772 S.E.2d at 169-70.

The Plaintiff cannot establish the necessary elements for a prescriptive easement. “[E]vidence of permissive use defeats the establishment of a prescriptive easement because use that is permissive cannot also be adverse or under a claim of right. Stated another way, when a claimant uses property with the permission of the owner, he or she acknowledges the owner's rights and uses the property without an affirmative, hostile act toward the owner's rights.” *Id.* at 310, 772 S.E.2d at 173 (internal citations omitted).

In *Bundy v. Shirley*, a case with facts strikingly similar to this case, our Supreme Court addressed the issue of permissive use as it relates to prescriptive easements. The Court held that the claimant's claim of a prescriptive easement was defeated because the property owner gave the claimant a key to unlock the cable that blocked the road and later gave him permission to construct a gate on the property in the same location as the cable. *See id* at 311-12, 772 S.E.2d at 173-74. The court, relying on established precedent, found that the claimant's use of the disputed road was entirely permissive. *Id.*; *see also Paine Gayle Properties, LLC v. CSX Transp., Inc.*, 400 S.C. 568, 584, 735 S.E.2d 528, 537 (2012) (“The asking and obtaining of permission...stamps the character of the use as not having been adverse, or under claim of right, and therefore as lacking that essential element which was necessary for it to ripen into a right by prescription.”). Only after property owner revoked the claimant's permission to use the road did the claimant begin to use the disputed road in a manner hostile to the owner's rights. *See id.*

Like *Bundy*, the installation of the gate blocking access to the Defendant's property leads to the conclusion that the Plaintiff's use of the road was by permission, not adverse to the

Defendant's rights. Defendant and her predecessor in interest granted permission to others by allowing them to gain access through the use of a key or combination lock. *See Bundy*, 412 S.C. at 311, 772 S.E.2d at 173 (stating the presence of a locked gate is strong evidence of permissive use). The locks that could not be identified, or that belonged to those who used the property without the Martin's express permission, were removed from the gate on at least six different occasions between 1970 and 2014. There is no evidence that the Plaintiff or its predecessor in interest made any distinct and positive assertion of a right hostile to the Martins after the gate was erected on the Martin Property. Therefore, Plaintiff's use of the road has never been adverse or under a claim of right. It has always been permissive.

C. Dedication of the Road to Public Use

Under certain circumstances, which do not exist here, private property can be dedicated to public use. "Dedication requires two elements. First, the owner must express in a positive and unmistakable manner the intention to dedicate his property to public use. Second, there must be, within a reasonable amount of time, an express or implied public acceptance of the property offered for dedication. *Town of Kingstree v. Chapman*, 405 S.C. 282, 302, 747 S.E.2d 494, 504 (2013). The party claiming the dedication has the burden of establishing dedication and public acceptance. *Id.*

The Plaintiff does not contend that Defendant has made an express dedication. Rather, the Plaintiff claims that the Defendant's intention to dedicate should be implied from the circumstances. "Absent an express grant, one who asserts a dedication must demonstrate conduct on the part of the landowner clearly, convincingly, and unequivocally indicating the owner's intention to create a right in the public to use the property in question adversely to the owner." *Id.* at 302, S.E.2d at 504. South Carolina courts have recognized two types of implied

dedication. *Id.* First, where the question of dedication arises from the sale of land with references to maps or plats. *Id.* Second, when the dedication arises from an abandonment to or acquiescence in public use. *Id.* The Plaintiff argues that the property was dedicated under the second method—abandonment to or acquiesce in public use.

The Plaintiff cannot prove an intention to abandon the roadway in issue or acquiesce to the public's use of the road. For more than 40 years, the Defendant and her predecessors in interest, have taken action to prevent the public use of the road by maintaining a locked gate. The constant presence of the locked gate clearly demonstrates an intention to keep the road under Defendant's ownership. Any argument stating that use of the road by certain members of the public shows the Defendant's intention to dedicate the road should be rejected. "The essence of dedication is that it shall be for the use of the **public at large**. *Id.* at 304, 747 S.E.2d 505 (emphasis added). The Defendant or her predecessor in interest allowing certain people to use the road cannot be construed as an intention to dedicate the road to the public at large.

The Plaintiff can not show acceptance of the road. "As with intention to dedicate, no formal acceptance by a public authority is necessary to show public acceptance. Acceptance may be implied by the public or a public authority continuously using or repairing the property. The use, repair, and working of the streets by public authorities is a mode of acceptance." *Id.* at 303, 747 S.E.2d at 505. Here, Richland County has posted a sign approximately 200 feet in front of the locked gate stating that county maintenance ends at that point. The portion of the road in question is not, nor has it in the past, been maintained by Richland County. The fact that Richland County maintains a portion of the road before the locked gate has no bearing on this case. Further supporting that there has been no public acceptance, Richland County's Right of

Way Agent, Randy Byrd, testified that the road is a private road. Clearly, the Plaintiff has not established dedication and acceptance.

D. Adverse Possession/Prescription by the Servient Tenement

Even if this Court were to find that an easement through the Defendant's property existed at one point in time, Defendants have taken ownership of the former easement through adverse possession. The Defendant has asserted a counterclaim for Adverse Possession. As discussed, the Defendant and her predecessors in interest have maintained a locked gate across the road for over 40 years. As such, the Defendant has established all of the required elements of adverse possession. In South Carolina, the party asserting adverse possession must show continuous, hostile, open, actual, notorious and exclusive possession for at least ten years. *Jones v. Leagan*, 384 S.C. 1, 10, 681 S.E.2d 6, 11 (2009).

"Generally, a claimant's possession to constitute adverse possession much be such as to indicate his exclusive ownership of the property, and not only must his possession be without subserviency to, or recognition of the title of the true owner, but it must be hostile thereto and to the whole world." *Gregg v. Moore*, 226 S.C. 366, 370, 85 S.E.2d 279, 281 (1954). The Martin's locked gate across the road clearly demonstrates the Defendant's exclusive and hostile possession of the property. South Carolina courts have repeatedly found that the fencing or gating of property is clear evidence of one exercising dominion and control over the property in a manner that is adverse. *See e.g., King v. Hawkins*, 282 S.C. 508, 511, 319 S.E.2d 361, 362 (1984). Similarly, South Carolina courts have determined that installing fencing and making other improvements to property constitutes open and notorious acts for the purposes of proving adverse possession. *Jones*, 384 S.C. at 14, 681 S.E.2d at 14. In addition to proving hostile, open, actual, notorious and exclusive possession, the Defendant can show that these elements

have existed continuously for a period greater than ten years because the gate across the road at issue was erected in 1970. The road has been obstructed by the gate since 1970.

EXHIBITS

1. Map of property from Richland County Tax Assessor's website with demarcations of boundaries, roads and gates
2. Various pictures of NE Shady Grove Road (public portion and private portion) and the gate on Nancy martin's property
3. 2004 Plat for Gonzales Land and Timber, LLC filed with the Richland County Register of Deeds
4. 1930 Plat by Jas E Covington
5. 1973 Timber deed and Invitation to Bid to cut timber on what is now Nancy Martin's property
6. 2010 Plat of Lots 3, 4, 5 and 6 prepared by Carl Bostick and filed in the Richland County Register of Deeds
7. 2012 Plat of 64.68 acres prepared by Carl Bostick and filed in the Richland County Register of Deeds
8. Fax from Randy Byrd to Carl Bostick dated 12/8/09
9. Map from Randy Byrd Deposition delineating certain roads as SCDOT, County and private roads.
10. Richland County's FOIA response dated January 6, 2015 regarding copies of communications and records pertaining to the addressing of 1078 and 1080 Shady Grove Road

11. Richland County's Policies and Procedures for assigning an addressing properties in Richland County (Addressing and Road Naming Guidelines, Richland County, SC)

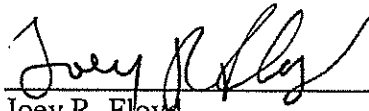
WITNESSES

1. Gary Wessinger
2. Glen Wessinger
3. Clint Taylor
4. Mark Paul Kays
5. Randy Byrd
6. Nick Anderson
7. Carl Bostick
8. Nancy Martin

EVIDENTARY ISSUES

None known at this time.

BRUNER POWELL WALL & MULLINS, LLC



Joey R. Floyd

Wesley D. Peel

P.O. Box 61110

Columbia, SC 29260

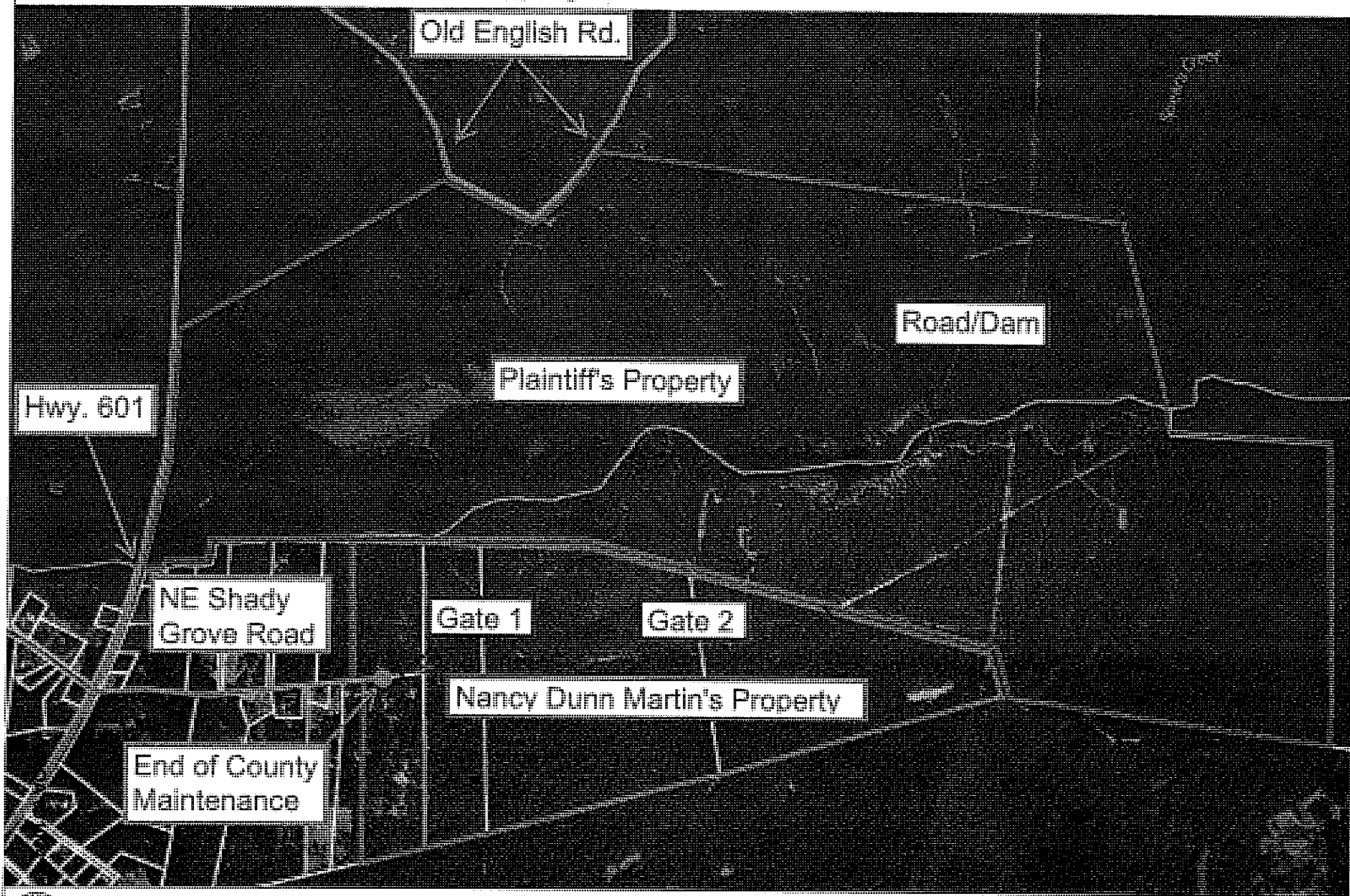
(803) 252-7693

Attorneys for the Defendant

March 17, 2016

EXHIBIT A

Richland County, SC | Internet Mapping



DISCLAIMER: This is a product of the Richland County GIS Department. The data depicted here have been developed with extensive cooperation from other county departments, as well as other federal, state and local government agencies. Richland County expressly disclaims responsibility for damages or liability that may arise from the use of this map.

EXHIBIT B

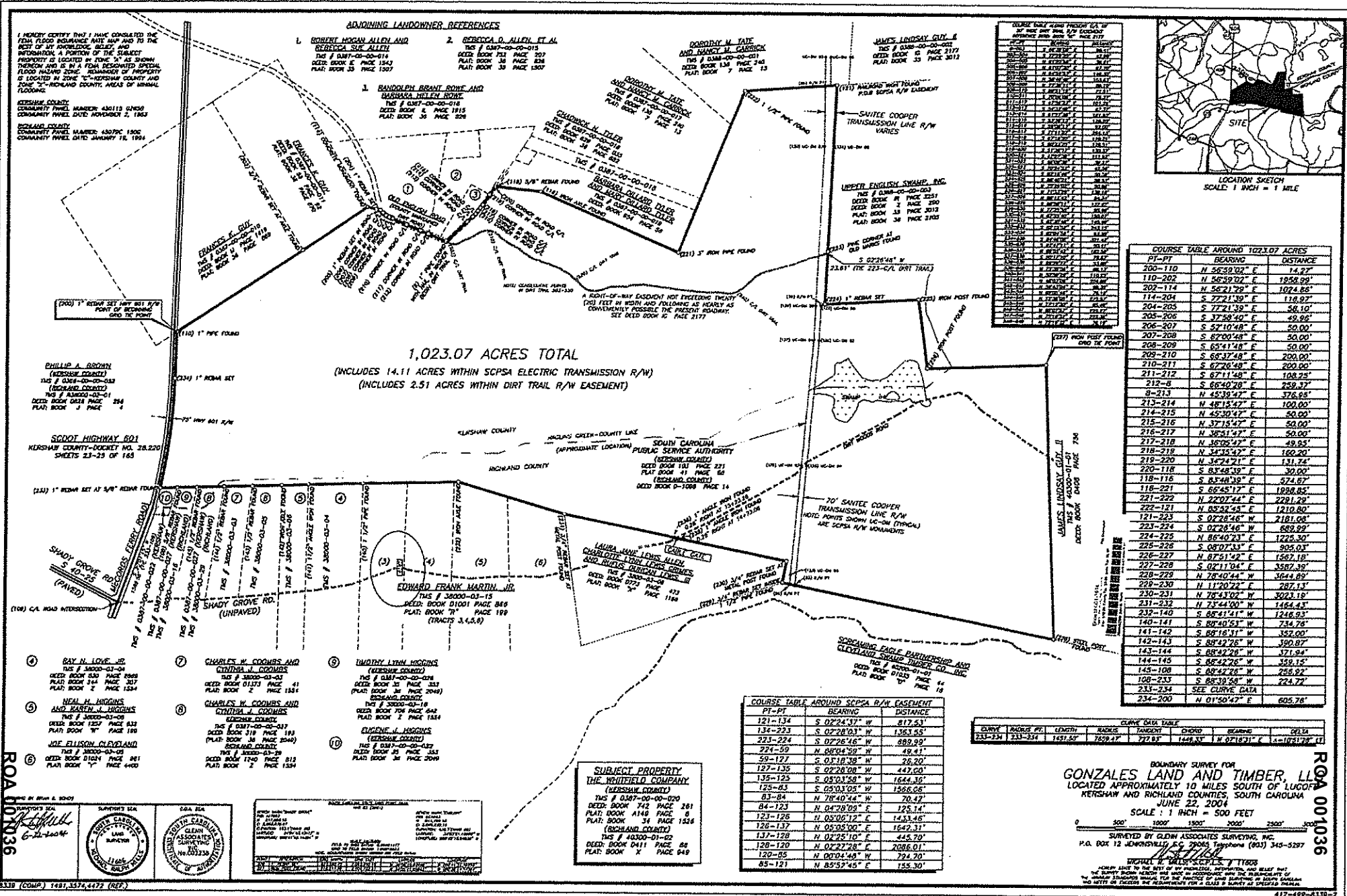


EXHIBIT C

9-15-43

TO WHOM IT MAY CONCERN

NOTICE IS HEREBY GIVEN THAT THE
 ALL RIGHTS THAT WERE
 ASSIGNED BY THE UNITED STATES
 MARINE CORPS TO THE
 THE UNITED STATES OF AMERICA
 BY THE UNITED STATES OF AMERICA
 FOR THE UNITED STATES OF AMERICA

THIS NOTICE IS GIVEN TO THE
 UNITED STATES OF AMERICA
 FOR THE UNITED STATES OF AMERICA

AND THE UNITED STATES OF AMERICA
 FOR THE UNITED STATES OF AMERICA

1943

Baxley, Pratt & Wells, P.A.

Attorneys at Law

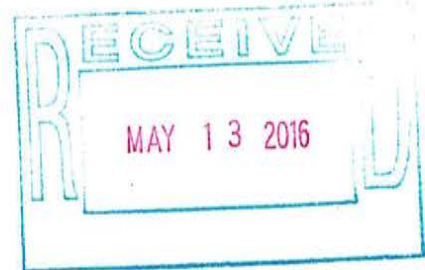
CHARLES B. BAXLEY
JOHN W. WELLS

Three The Common at Lugoff
Post Office Box 10
Lugoff, South Carolina 29078
Telephone 803-438-4200
Fax 803-438-5090

REX K. PRATT
(1929-1999)

May 11, 2016

Judge Joseph M. Strickland
Richland County Judicial Center
1701 Main Street, Room 212
Columbia, SC 29201



Re: Country Properties, LLC vs. Nancy Dunn Martin

Dear Judge Strickland:

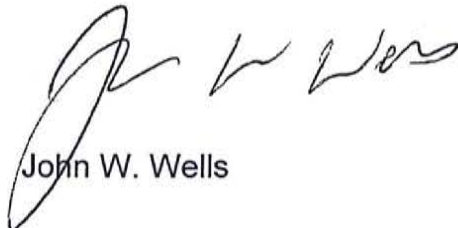
Enclosed are four (4) proposed orders in Country Properties, LLC vs. Nancy Dunn Martin. I have prepared a proposed order granting relief on all three theories of law pled by the Plaintiff, and a proposed order granting relief on each individual theory of law. If requested, I can prepare an order granting relief on any two theories and denying relief on the other. I have also enclosed a flash drive which has a copy of each order in Word format to allow you discretion in changing the orders as you see fit.

I have done this to allow you flexibility in ruling on the separate legal theories which are independent of each other. By a copy of this letter and the four (4) proposed orders to Joey R. Floyd, I am advising him of this correspondence.

With kindest regards, I remain

Very truly yours,

BAXLEY, PRATT & WELLS, P.A.



John W. Wells

JWW/jdl
Enclosures
cc: Joey R. Floyd

**FINAL ORDER GRANTING RELIEF
THROUGH A PRIVATE PRESCRIPTIVE
EASEMENT**

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
Country Properties, LLC,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Final Order
	)	
Nancy Dunn Martin,	)	
	)	
Defendant.	)	
	)	

Hearing Date:	March 21-24, 2016
Judge:	Joseph M. Strickland
Court Reporter:	Amanda Creel Godfrey
Attorney for Plaintiff:	John W. Wells
Attorney for Defendant:	Joey R. Floyd

"I regard this case as one of the very greatest importance, the decision of which will control in a measure, one of the most constantly recurring grounds of controversy in reference to a right which is held to as tenaciously, and asserted as vigorously, as the recognized love of the Anglo Saxon for his land: The right to the use of a road. I have accordingly given it my most earnest and laborious consideration." Justice Cothran writing for the majority in Brasington v. Williams 143 S.C. 223, 141 S.E. 375 (1927).

This action is one brought by the Plaintiff to establish an easement across one property of the Defendant serving the property of the Plaintiff. The property of the Plaintiff, described herein below, will sometimes be referred to as the dominant estate and the property of the Defendant, also described herein below, will sometimes be referred to as the servient estate.

This case was commenced by the filing of a Summons and Complaint on March 18, 2014, seeking an easement across the lands of the Defendant on three separate theories, to wit; easement by deed; a private easement arising at law by prescription; and an easement by virtue of the fact that the road identified by the Plaintiff through the property of the Defendant is a public road. The Defendant filed and served her Answer and Counterclaim asserting various defenses including a general denial of the allegations by the Plaintiff; that the Plaintiff's claims are barred by the Statute of Limitations, abandonment of the easement and adverse possession of the easement by the Defendant. The Plaintiff filed a Reply which is a general denial of the allegations of the Defendant's Counterclaim.

This action was referred to me by a Consent Order of Referee of the Honorable L. Casey Manning dated July 7, 2014. Discovery was conducted by both sides, and the matter was set for trial during the week of March 21, 2016.

The Plaintiff appeared at the hearing in the person of James F. Podell, a member and principal of the Plaintiff limited liability company, represented by John W. Wells, its counsel of record. The Defendant appeared represented by Joey R. Floyd and Wesley D. Peel, both of whom have appeared as counsel of record for the Defendant. The case was tried before me without a jury.

FINDINGS OF FACT

1. That the Plaintiff is a limited liability company formed under the laws of the State of South Carolina with its principal place of business in the County of Richland, State of South Carolina.

2. That the Defendant is a citizen and resident of the County of Richland, State of South Carolina.

3. That the Plaintiff is the owner of a certain tract of land located partly in Kershaw County and partly in Richland County which was conveyed to the Plaintiff by deed of Pine Ridge Investments, LLC, dated March 11, 2009, and recorded in the RMC office for Richland County in Book 1515, at page 1554, the same being also filed in the ROD office for Kershaw County, the tract being described as follows:

All that piece, parcel or lot of land, with improvements thereon, if any, lying, situate and being in the State of South Carolina, Counties of Richland and Kershaw, located approximately ten (10) miles South of Lugoff, containing 1,023.07 acres, more or less, and being shown and described on a plat prepared for Gonzales Land and Timber, LLC, by Michael R. Mills, P.L.S., dated June 22, 2004, and recorded in the office of the ROD for Richland County in Book "951", at page 1618 and recorded in the office of the ROD for Kershaw County in Book "3121", at page 7. Said plat is incorporated herein by reference for a more complete and accurate description.

The 1,023.07 acres is split between Richland County, containing 383.63 acres and Kershaw County containing 640.07 acres.

4. That the Defendant is the owner of several tracts of land located in the County of Richland, State of South Carolina described as follows:

PARCEL 1:

All that certain piece, parcel or tract of land, situate, lying and being near Raglin Creek, east of U.S. Highway 601, in School District No. 2, in the County of Richland, and State of South Carolina, containing Sixty-Five and 06/100ths (65.06) acres, more or less, and bounded as follows: to wit: On the NORTH by property now or formerly of R. W. Lloyd; on the EAST by property now or formerly of R. W. Lloyd; on the SOUTHEAST and SOUTH by property now or formerly of Astor V. Cleveland; and on the WEST by property now or formerly of Jessie Dunn Martin; said tract will more fully appear reference to a plat prepared for Rufus D. Lewis, Jr., by Edward R. Owens, R.L.S., dated October 18, 1976. Be all measurements a little more or less.

TMS# 38000-03-08 and 38000-03-08

This being the same property conveyed to the Defendant by deed of Laura Jane Lewis Allen, et al. dated November 15, 2012, and recorded in the RMC for Richland County in Book 1813, at page 244.

PARCEL 2:

All that certain piece, parcel or lot of land with improvements thereon, situate, lying and being in the County of Richland, State of South Carolina, being shown and designated as Parcels 3, 4, 5, and 6, containing in the aggregate 164.0 acres, more or less, as shown on a plat surveyed for Heirs of Osie E. Martin by Jas. C. Covington, C.E., dated October 8, 1930, and recorded in the office of the RMC for Richland County in Plat Book R, at page 199; said parcels having such boundaries and measurements as shown on said plat which are specifically incorporated herein by reference thereto.

TMS # R38000-03-07 & R38000-03-15

ALSO: All that certain piece, parcel or lot of land, situate, lying and being about 23 miles east of the City of Columbia, and about one mile east of State Highway No. 26, now known as U.S. Hwy. 601, in the County of Richland, State of South Carolina, being more particularly shown as a portion of Tract 1 and 2 on a plat of land surveyed for the heirs of Mrs. Osie E. Martin by James C. Covington, C.E. dated October 8, 1930, recorded in the office of the Clerk of Court for Richland County in Plat Book R, at page 199; said property being more particularly shown and delineated as 23.20 acres on a plat prepared for Neal H. Higgins and Karen J. Higgins by W. Frank McAulay, Jr., PLS# 3124, dated January 6, 1995, recorded in Plat Book 55, at page 7626, and having such shapes, courses, distances, metes and bounds as shown upon said latter plat, reference being craved thereto as often as necessary for a more complete and accurate description; be all measurements a little more or less.

TMS #: R38000-03-06

ALSO: All that certain piece, parcel or lot of land, situate, lying and being about 23 miles east of the City of Columbia, and about one mile east of State Highway No. 26, now known as U. S. Hwy. 601, in the County of Richland, State of South Carolina, being more particularly shown as a portion of Tract 2 on a plat of land surveyed for the heirs of Mrs. Osie E. Martin by James C. Covington, C.E., dated October 8, 1930, recorded in the office of the Clerk of Court for Richland County in Plat Book R, at page 199; said property being more particularly shown and delineated as 23.30 acres on a plat prepared for Van A. Higgins and Linda L. Higgins by W. Frank McAulay, Jr., PLS# 3124, dated January 6, 1995, recorded May 19, 1995 in Plat Book 55, at page 7627, and having such shapes, courses, distances, metes and bounds as shown upon said latter plat, reference being craved thereto as often as necessary for a more complete and accurate description; be all measurements a little more or less.

TMS# R3800-03-48

Parcel 2 was conveyed to the Defendant by Corrective Limited Warranty Fiduciary Deed of Dorothy Martin Tate and Nancy Dunn Martin as successor co-trustees of the Edward Frank Martin, Jr., Trust dated August 5, 2004, dated December 13, 2007, and recorded in the RMC office for Richland County in Book 1384, at page 3241. This corrective deed corrected a deed from the same grantor to the same grantee dated August 9, 2007, and recorded in the RMC office for Richland County on September 20, 2007, in Book 1359, at page 2178.

5. That the Plaintiff's tract is divided by Raglin Creek, which flows generally from west to east, and serves as the county line between Kershaw County to the north of the Creek and Richland County to the south of the creek. According to the property description in the Plaintiff's deed, approximately 384 acres of the Plaintiff's property is located south of Raglin Creek in Richland County, and approximately 640 acres of the Plaintiff's property lies to the north of Raglin Creek in Kershaw County.

6. That the Plaintiff's tract has road frontage on U. S. Highway 601 above Raglin Creek in Kershaw County, but the Plaintiff's tract has no public road access south of Raglin Creek. To the extent that Raglin Creek is a natural barrier to ingress and egress, the 384 acres of the Plaintiff's tract located south of Raglin Creek in Richland County has no access except via the easement that the Plaintiff seeks to establish in this action.

7. I find from the testimony presented at trial that at some point several years before the plaintiff purchased his property in March of 2009, Pine Ridge Investments, LLC, the Plaintiff's predecessor in title, built a dam across Raglin Creek with a narrow road across the top of the dam. After the Plaintiff purchased the property, it improved the dam somewhat, making it safe for a vehicle to cross, but the dam has been damaged by storms, as it appears from a photograph,

Plaintiff's Exhibit 37, showing a gap eroded from the dam, and during the historic rains of October 2015, the dam washed out completely. I find as a matter of fact from the greater weight of all of the testimony presented, that Raglin Creek is a substantial natural barrier to the Plaintiff's ability to access the 384 acres of its property south of Raglin Creek in Richland County, and while the property south of Raglin Creek can be accessed by foot and has at times been accessible by personal vehicle, the natural barrier of the creek does limit the Plaintiff's ability to access its lands south of the creek, particularly with large vehicles and equipment necessary to harvest timber on the lands in Richland County south of Raglin Creek.

8. That the Plaintiff's use of its tract is for recreation including hunting and fishing, and for growing and harvesting timber. This has been the historical use of the tract by all of the Plaintiff's predecessors in title during the time period relevant to this case.

9. That the use by the Defendant and her predecessors in title of her tract of land has been for recreation including hunting and, growing and harvesting timber.

10. That there is a dirt road leading from Highway U. S. 601 to the southern boundary of the Plaintiff's tract and extending through the Plaintiff's tract to property owned by James L. Guy, II. This road is located south of Raglin Creek and would provide access to the Plaintiff's 384 acres south of Raglin Creek but for a locked gate on the Defendant's property where the road passes through the Defendant's tract. This locked gate is the source of the controversy in this case.

11. That the first 2,900 feet or so of the road in question from U. S. Highway 601 and proceeding eastward is maintained by Richland County. Richland County has no record of any deeded easement to this portion of the road maintained by it and provides maintenance to that

portion of the road under the legal theory that an easement by prescription in favor of the public has arisen over time from the continuous and adverse use of the road by the public. The county maintained portion of Northeast Shady Grove Road extends eastward from U. S. Highway 601 past the Defendant's western property line and ends on the Defendant's property. The end of county maintenance sign on Northeast Shady Grove Road is just inside the Defendant's property.

12. That Richland County has named the portion of the road maintained by it Northeast Shady Grove Road.

13. That the dirt road in question is shown on the 2004 plat by Michael Mills of Glenn and Associates, Plaintiff's Exhibit 2, as Shady Grove Road and Dirt Woods Road. It is shown on the 1998 Robert H. Lackey Surveying, Inc. plat, Plaintiff's Exhibit 6, as N.E. Shady Grove Road and Existing Woods Road. It is shown on the 1969 Fred J. Hager plat, Plaintiff's Exhibit 8, as Woods Road. It is shown on the 1957 plat for Powe Veneer Company, Plaintiff's Exhibit 10, as Camp Road. All of these plats show a dirt road extending from U. S. Highway 601 eastward below Raglin Creek through the Defendant's tract to the lands of the Plaintiff and then extending to the Guy Property east of the Plaintiff's tract.

14. The road in question appears on aerial photographs from 2013, Plaintiff's Exhibit 42; 1981, Plaintiff's Exhibit 43; 1970, Plaintiff's Exhibit 44; 1951, Plaintiff's Exhibit 45; and 1943, Plaintiff's Exhibit 46. These aerial photographs show a road in the same location as the road depicted in the above mentioned plats. The road was receiving enough use to resist the overgrowth of vegetation and remain visible from the air from 1943 to 2013.

15. The road in question is shown as a light duty road on 1953 Leesburg Quadrangle Map prepared by the United States Department of the Interior Geological Survey, Plaintiff's Exhibit 41.

16. The road in question is shown on a 1939 map prepared by the South Carolina Highway Department, Plaintiff's Exhibit 49. On this map, it is shown as a double solid line, whereas private roads are depicted on this map by a dotted line, indicating that the South Carolina Highway Department considered the entire road back to the Plaintiff's property to be a public road in 1939.

17. The Plaintiff produced no less than four witnesses who testified that the road in question had received public maintenance from Highway U. S. 601 to the Plaintiff's property line during the 1950s and 1960s.

18. That no party or government authority has petitioned any court or initiated any action to close or abandon any portion of the road in question that was previously maintained by the public or designated as a public road by the South Carolina Highway Department. No party has complied with the requirements of §57-9-10 South Carolina Code of Laws Annotated to abandon or close the road in question or any part thereof.

19. At this point, it would be useful to compare the history of the 2,900 foot portion of Northeast Shady Grove Road that currently receives maintenance services from Richland County (hereinafter county maintained portion) with the disputed portion of the road that lies east of the end of county maintenance sign, and up to and beyond the Plaintiff's southern property line (hereinafter the disputed portion). According to the combined testimony of witnesses Algie Campbell, W. D. Kirkland, Bennie Higgins and Angus Lafaye, both the county maintained

portion and the disputed portion of the road in question received public maintenance services from 1945 until at least 1969. Both portions of the road are equally indicated as a public road on the 1939 South Carolina Highway Department Map, Plaintiff's Exhibit 49. Both portions of the road are equally vivid and distinct on the 1943 aerial photograph, Plaintiff's Exhibit 46, and the 1970 aerial photograph, Plaintiff's Exhibit 44. There is ample testimony from witnesses Campbell, Kirkland and Higgins that they enjoyed unfettered use of both portions of the road as members of the public during the 1940s, 1950s, and 1960s. There is no evidence of a written or recorded easement conveying either portion to Richland County. There is no evidence of a formal dedication of either portion to the public for use as a public road. From 1945 until at least 1969, both portions of the road, the part now maintained by Richland County and the disputed portion, enjoyed equal status as a publicly maintained road.

In 1962, the South Carolina General Assembly enacted into law §57-9-10 South Carolina Code of Laws Annotated which requires any interested person or, the State or its political subdivisions to file a court action to close a road and to give notice of that court action to other landowners whose property would be affected by the road closing.

In about 1970 the Dunn's Mountain Hunt Club began to lease the hunting rights on the property now owned by the Defendant and property to the west of the Defendant's tract owned by a man named Higgins. The hunt club installed a steel gate across the road in question on the Higgins property in about 1970 according to the Defendant's witness, Gary Wessinger. That gate was later moved in 1982 eastward onto the property of the Defendant according to Wessinger. It appears that after the gate was installed, Richland County stopped maintaining the

disputed portion of the road while it continued to maintain the 2,900 foot portion of the road that it maintains today.

In summary, both the county maintained portion of the road and the disputed portion of the road were equally public until at least 1969. The statutory requirement for closing a public road became law in 1962 while both portions were under equal public maintenance and equal public use. The Dunn's Mountain Hunt Club, and later the Defendant's predecessor in title, began erecting gates across the road in 1970, but neither they nor Richland County complied with the statutory requirements for closing a public road.

20. The compelling irony in this case is that the Defendant would be wholly without access to her property if the public easement to the first 2,900 feet of Northeast Shady Grove Road had not arisen at law from the very public maintenance and public use of the road described by the Plaintiff's witnesses. The Defendant readily accepts the benefit of the public easement providing access to her property, but seeks to deny that same benefit to the two landowners, the Plaintiff and Guy, whose lands are further down the road. If the public use and public maintenance were not as the Plaintiff's witnesses Campbell, Kirkland, Higgins and Lafaye testified that they were, the Defendant herself would be landlocked.

21. I find by clear and convincing evidence that the Plaintiff and its predecessors in title used the disputed portion of the road in question for a period exceeding twenty (20) years.

22. I find by clear and convincing evidence that the use by the Plaintiff and its predecessors in title was continuous and uninterrupted for the full twenty (20) year period.

23. I find by clear and convincing evidence that the use by the Plaintiff and its predecessors in title was adverse to the rights of the Defendant.

24. I find by clear and convincing evidence that efforts by the Defendant and her predecessors in title to stop the adverse use of the road in question by erecting and locking a gate on the road failed. The Plaintiff produced numerous witnesses who testified that they used the road openly and notoriously in spite of the Defendant's efforts, and the Defendant's witnesses testified that adverse users were cutting the chain on the gate and installing their own locks.

25. I find by clear and convincing evidence that the Plaintiff's use of the road in question was under a claim of right, that the members of the limited liability company believed they had a right to use the road in question because it appeared prominently on the 2004 Gonzales Plat, Plaintiff's Exhibit 2, and because its predecessors in title maintained a lock on the gate and used the road whenever they needed to do so.

26. I find no evidence that the Defendant or her predecessors in title ever gave the Plaintiff or any of those using the road in question under the plaintiff or his predecessors in title permission to use the road. The only people who received permission to use the road from the Defendant or her father were her surveyor, her foresters, the members of Dunn's Mountain Hunt Club and Santee Cooper; and in the end she withdrew her permission from the hunt club and Santee Cooper.

27. I find by clear and convincing evidence that the Plaintiff and its predecessors in title back to 1976 were business entities and a trust which could only use the disputed road in and through their employees, agents, foresters, timber crews, surveyors, real estate agents, and invited guest, who hunted and fished on the Plaintiff's tract together with members of hunt clubs who leased the hunting rights to the Plaintiff's tract and that these persons used the road in question with a frequency commensurate with the use of the property for hunting, fishing and, growing and

harvesting timber. From 1976 to the present, no individual person has owned the Plaintiff's tract.

28. I find by clear and convincing evidence that the Plaintiff has proved the identity of the thing enjoyed, the road in question, from 1939 when it appeared on the South Carolina Department of Highways Map through the 2004 Gonzales Plat.

29. I find by clear and convincing evidence that the Plaintiff has proven the elements of an easement by prescription.

30. I find that the Defendant has failed to prove by clear and convincing evidence that she has adversely possessed the road for a ten (10) year period. The Plaintiff produced witnesses who testified to using the road adversely to the Defendant's interests within a ten (10) year period prior to the filing of the lawsuit.

CONCLUSIONS OF LAW

THE PRESCRIPTIVE EASEMENT

The prescriptive easement derives from the presumption of a lost grant. "It is enough if the use of the way cannot be reconciled with the right of the owner of the land otherwise than by supposing a license or grant, and in that case, if sufficient time has elapsed, the law presumes a grant." Craven v. Rose 3 S.C. 72 (1871). The law presumes from the use of the way by the claimant, that he must have a grant of an easement that has been lost.

In order to establish an easement by prescription, a party must show: (1) The continued and uninterrupted use or enjoyment of a right for a full period of Twenty (20) years; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse or under a claim of right. Horry County v. Laychur, 315 S.C.364, 434 S.E.2d 259 (1993). Once a right of way by

prescription has been established by 20 years of continuous use, a later diminishment in the frequency of that use does not necessarily nullify the established right by prescription. Culthbert v. Lawton 3 McCord 194 14 S.C.L.194 (Ct. App. 1825). “Furthermore, in order to satisfy the continual use requirement, the use must only be of a reasonable frequency as determined from the nature and needs of the claimant.” Jones v. Daley 363 S.C.310, 609 S.E.2d 597 (2005). “The element of continued use does not require the use thereof every day for statutory period, or even on a weekly or monthly basis; but simply the exercise of the right more or less frequently according to the nature of the use and the needs of the claimant.” Jones v. Daley supra. The needs of the claimant in this case include only hunting sporadically, taking timber occasionally, showing the property for sale and surveying the property.

The standard of proof for establishing an easement by prescription is proof by clear and convincing evidence. Bundy v. Shirley 412 S.C. 292, 772 SE 2d 163 (2015). As to the twenty year use element, the Plaintiff produced testimony that members of the Plaintiff LLC, James Podell, and Claude Campbell used the disputed road to access their property before and after they acquired title to it on March 11, 2009. It produced testimony that Cecil Brazell had used the disputed road to hunt the property as an invited guest during the ownership period of Pine Ridge Investments LLC and that Harold Pickrel used the disputed road to show the property under the ownership period of Pine Ridge Investments LLC. It produced testimony that Angus Lafaye and Gordon Baker had used the disputed road to provide forestry services to both the Whitfield Company and Prospect Hill of Edisto Island during their ownership periods from 1999 to 2005. Also, Billy Cate used the disputed road to show the property during the Whitfield Company and Prospect Hill ownership periods. Mike Mills testified that he used the disputed road to survey

the Plaintiff's tract in 2004. Also, Gordon Baker testified that timber harvests were conducted on the Plaintiff's tract during the Whitfield company period of ownership and the Prospect Hill period, and that the log trucks used the disputed road to haul the timber out. The Defendant's witnesses testified that the log trucks caused damage to the disputed road when the timber was cut on the tract now owned by the Plaintiff. Tim Dargan testified that he used the disputed road to provide forestry services to Robert J. Sheheen as Trustee of the Lloyd Trust. Mr. Dargan produced and distributed Plaintiff's Exhibit 38, which is an advertisement inviting potential buyers to use the disputed road to access the property and giving out the combination of the lock on the gate. Jamie Guy II testified that he used the disputed road to hunt the property now owned by the Plaintiff under a hunting lease that was in effect during the Lloyd and Lloyd Trust ownership period from 1974 until 1999. Angus Lafaye testified that he used the disputed road to provide forestry services to the then owner of the land now owned by the Plaintiff from 1968 until 1969. Jamie Guy II testified that he has used the disputed road to access the property now owned by the Plaintiff and his property behind it continuously from the early 1950s until the filing of this lawsuit. Algie Campbell, W. D. Kirkland and Benny Higgins testified as to their use of the disputed road during the 1940s, 1950s, and 1960s. Claude Campbell testified that he had first used the disputed road to visit his uncle Fletcher Martin in 1939. In addition to the use witnesses as produced by the Plaintiff, the testimony of the defense witnesses, including the Defendant herself, that unauthorized locks had to be removed from the chain on the Defendant's gate from 1982 until 2009 proves adverse use by the owners of the unauthorized locks over a twenty year period.

A party may “tack” the period of use of prior owners in order to satisfy the twenty year requirement. Morrow v. Dyches 328 S. C. 522, 492 S. E. 2nd 420 (1997). I conclude as a matter of law that the owner can make use of the road through his agents, foresters, surveyors, realtors, timber crews, and hunters who hunted by invitation of the owner or as members of a hunting club that has leased the hunting rights to the property. In this case the property now owned by the Plaintiff has been owned by a trustee and various business entities since December 30, 1976, which entities must act through their agents, contractors, and lessees, and so forth.

I conclude as a matter of law that the Plaintiff has met his burden of proof as to use of the disputed road for a twenty year period.

I conclude as a matter of law that the Plaintiff has met his burden of proof as to the identity of the thing enjoyed by introducing the various plats, aerial photographs, and maps cited above in the paragraphs 13 and 14 of the Findings of Fact.

I conclude as a matter of law that the use of the disputed road by those using the road under the Plaintiff and its predecessors in title was adverse. “When the claimant has established that the use was open, notorious, continuous and uninterrupted, the use will be presumed to have been adverse.” Kelley v. Synder 396 S. C. 564, 722 S. R. 2d 813 (2012). The Plaintiff’s witnesses who testified as to the use of the disputed road generally used it to hunt, survey the Plaintiff’s property, cruise timber, and cut timber, all of which are daytime activities. Many of them testified that their use was open and notorious. Most of them used motor vehicles. It is difficult to imagine a use of a dirt road more adverse than sending fully loaded log trucks down it as witness Gordon Baker described. Witness Tim Dargan put the combination of his lock on the gate in a sales flier and distributed it to potential purchasers. The lock cleaning testimony of the

Defendant's hunt club witnesses showed that unauthorized users cut the chain on the Defendant's gate and installed unauthorized locks on the chain continually during the 1970s, 1980s, 1990s, and 2000s, so that periodic lock cleanings were necessary to remove the unauthorized locks. After each lock cleaning, the accumulation of unauthorized locks would start again, indicating that the adverse users simply ignored the efforts by the Defendant to restrict their use. The act of cutting the Defendant's chain and installing a lock not authorized by her is an act in defiance of the Defendant's right to control the road or her property, the quintessential adverse use, and according to the Defendant's witnesses, it went on all the time during the twenty year period prior to the filing of this lawsuit.

The Defendant asserts that the Plaintiff and its predecessors in title used the disputed road by permission granted by the Defendant and her predecessors in title, and that the use was permissive and not adverse. There is no evidence in the record that the Plaintiff or any of its witnesses ever received permission from the Defendant or her predecessors in title except witness Bennie Higgins and witness Jamie Guy II. Witness Bennie Higgins, who used the disputed road as a member of the public and was otherwise not associated with any owner of the Plaintiff's tract, testified that he obtained a key to a gate on the road from Wessinger (Transcript p. 180, line 20) in the 1970s. Gary Wessinger denies giving Higgins a key (Transcript p 390, line 1). But if this key was given to Bennie Higgins it was while the gate across the disputed road was on the property of one Higgins, also leased by the hunt club before the gate was moved to the Defendant's property in 1982 according to Defendant's witness Gary Wessinger. Even if witness Higgins got a key to the gate he was not an owner of the Plaintiff's tract at the time, and the gate was not located on the Defendant's tract at that time. As to witness Jamie Guy II, the

Defendant's witnesses associated with the Dunn's Mountain Hunt Club testified that Mr. Guy's lock was not removed from the Defendant's gate during the various lock cleanings because Mr. Guy had an arrangement with the Defendant's father to use the disputed road. Mr. Guy came back to testify in reply that no such arrangement existed, and that he never sought or received permission from the Defendant or her father to use the disputed road.

The Defendant cites the case of Bundy v. Shirley supra as authority for the proposition that the gates erected by the hunt club prove permissive use of the road. In that case Shirley, who was seeking to prove a prescriptive easement over the lands of Bundy, built a gate across the road on Bundy's property with Bundy's permission. The Supreme Court held that by going to Bundy and obtaining permission to build the gate, Shirley acknowledged Bundy's right to control the use of the road, and the act of obtaining permission to build the gate rendered Shirley's use of the road permissive rather than adverse. Also in Bundy v. Shirley, Bundy's property had been leased to the State of South Carolina as game management lands under a program where the public was allowed to enter onto private property leased to the state to hunt and carry on other recreational activities during the twenty year use period. The Supreme Court expressed doubt as to whether Shirley's use of the road while the lands were open to the public constituted adverse use. Finally, during the game management lease, the South Carolina Department of Natural Resources erected a cable gate across the road. Shirley sought and obtained a key from the SCDNR game warden which he used to unlock the SCDNR gate and use the road. Obtaining the key from the game warden, the lessee of the owner Bowater was evidence of permissive use.

In this case, the Plaintiff had nothing to do with the construction or maintenance of the gates across the disputed roadway. The Defendant's property has never been leased to the state for use by the public. The Plaintiff has never obtained a key from the Defendant or any lessee of the Defendant. After the Defendant removed the Plaintiff's lock from her gate in 2009, the Plaintiff made several attempts to contact the Defendant to discuss the matter. When these efforts proved unsuccessful it ultimately filed this lawsuit. None of the facts that led the Supreme Court to conclude that Shirley's use of the road was permissive in Bundy V. Shirley supra are present in this case. Under Williamson v. Abbott 107 S.C. 397, 93 S. E. 15 (1917). "The asking and obtaining of permission" is necessary to stamp the character of the use as not having been adverse. In this case the Defendant and her predecessors in title erected a gate across the disputed road, by all accounts refused to give the Plaintiff or the Plaintiff's predecessors in title permission to use the disputed road, and the Plaintiff and its predecessors in title continued to use the road whenever they needed to do so in spite of the gate. In order to support a finding of permissive use, the Defendant, a tenant of the Defendant, or someone claiming authority under the Defendant would first have to give permission to the Plaintiff or someone claiming under it to use the road or at least provide a key, which never happened in this case. Finally, the case of Craven v. Ross 3 S.C. 72 (1871) held that, "The way had been used for the required period over land enclosed and occupied by the defendant and during a portion of that time the plaintiff had, in order to use it, opened a gate placed by the defendant at the entrance of the land. It therefore followed that if the use was of the character stated in the evidence, it was necessarily adverse." In other words, continued use by the Plaintiff after the Defendant erects a gate on the road has been held to be evidence of adverse use.

A party claiming a prescriptive easement under a claim of right must demonstrate a substantial belief that he had the right to use the road based upon the totality of the circumstances. Hartley v. John Wesley United Methodist Church 355 S.C. 145, 584 S. E. 2d 386 (Ct. App. 2003). The law granting a prescriptive easement under claim of right does not mandate a party to believe that he holds actual title or that he plans to acquire it. Hartley v. John Wesley United Methodist Church, supra. James Podell testified that he believed that he had the right to use the disputed road because it was shown on the 2004 Mills plat, Plaintiff's Exhibit 2, that was used in drafting the deed to the Plaintiff and referred to it in the property description, based on statements made by his closing attorney in reference to the right to use the road at his closing, and based on the fact that he was able to use the disputed road to access his property throughout the process of purchasing the Plaintiff's tract. Likewise, other witnesses produced by the Plaintiff who used the road under prior owners testified that they believed that they had the right to use the road because it had been used for a considerable time to access the Plaintiff's tract and because it had received public maintenance services in the past. I conclude as a matter of law that the Plaintiff has proved by clear and convincing evidence that the Plaintiff and its predecessors in title used the disputed road under a claim of right. I conclude as a matter of law that the Plaintiff has proved that it has a private prescriptive easement to use the disputed road across the lands of the Defendant to access the lands of the Plaintiff.

STATUTE OF LIMITATIONS

The statute of limitations applicable to prescriptive easement actions is ten (10) years from the time the easement is obstructed. §15-3-340 *South Carolina Code of Laws Ann.* Bowen v. Team 6 Rich. 298, 40 S. C. L. 298 (1853). The ten (10) year statute under current §15-3-340

South Carolina Code of Laws Ann. is the only statute of limitations that has ever been used in a prescriptive easement case. §15-3-360 *South Carolina Code of Laws Ann.* has never been applied in a prescriptive easement case, and it cannot be applied to a claim for prescriptive easement because the Claimant in a prescriptive easement case is forced to rely on multiple entries on the servient estate which must occur at least twenty (20) years prior to the filing of the lawsuit. If he files the action within one (1) year of each entry upon which he relies he will never have twenty (20) years of continuous use when filing the suit.

ADVERSE POSSESSION OF THE EASEMENT BY DEFENDANT

The Defendant has not adversely possessed the easement over Shady Grove Road, because she has not obstructed the adverse use of the road for the full ten (10) year period required under the Statute of Limitations §15-3-340 *South Carolina Code of Laws Ann.* and the common law. Bowen v. Team supra. The Plaintiff produced testimony of witnesses James Podell, Claude Campbell, Lafaye, Baker, Cate, Pickrel, Cecil Brazell, Mac Brazell, Mills and Guy to prove use of the disputed road within ten (10) years of the filing of suit. Adverse possession is the same legal issue as the running of the Statute of Limitations since the cause of action for adverse possession is based on the running of the ten (10) year Statute of Limitations.

Evidence of adverse use of the road by the Plaintiff and others within ten (10) years of the filing of the action defeats the Defendant's claim of adverse possession.

CONCLUSION

In conclusion the Plaintiff has proved that the disputed road appears on maps, plats and aerial photographs dating back to 1939. It has received public maintenance in the past and use by the public. Those performing work, hunting and fishing under the Plaintiff and his

predecessors in title have use the road to reach the Richland County side of the Plaintiff's tract South of Raglin Creek in spite of the gates erected by the Defendant and her predecessors in title for a period exceeding twenty years. The efforts by the Defendant to curtail such use by erecting gates, coupled with the stubborn determination of the Plaintiff and its predecessors to continue such use, establishes that the use was adverse. Finally, the deed to the Defendant's grandfather, E. F. Martin, Sr., imposes a twenty (20) foot easement on her property extending from west to east to provide access to the predecessors in title to the southeastern corner of the Plaintiff's tract, placing the Defendant on notice that she owes the Plaintiff access across her property to its lands lying south of Raglin Creek. The prescriptive easement is based on the theory of a lost grant, and in this case, the lost grant has turned up in the 1939 deed to E. F. Martin, Sr. and the 1926 deed to Lura Mae Kinsland. Considering all of these facts together, it is manifest that the Plaintiff is entitled to at least a private easement to use this road that has endured for seventy years, and has been used by the Plaintiff and its predecessors in title as the principal, if not the sole, access to that portion of the Plaintiff's property lying south of Raglin Creek in Richland County, which creek has obstructed access to this portion of the Plaintiff's property from U.S. Highway 601 for most of that seventy year period.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is ordered:

1. That the Plaintiff has a private twenty (20) foot wide easement across the lands of the Defendant to use the disputed portion of Northeast Shady Grove Road from the end of county maintenance sign to the Plaintiff's southern property line as shown on the 2004 Gonzales plat, Plaintiff's Exhibit 2. The Defendant is enjoined from obstructing the Plaintiff's use of the road

by a locked gate or any other device. To the extent that the Defendant keeps a gate across said road, the Defendant is ordered to provide the Plaintiff with a means of opening the gate such as a key or combination to any lock on the gate within thirty (30) days of the signing of this order. This easement is appurtenant to the tract now owned by the Plaintiff and shall run with the land to the Plaintiff's successors and assigns

The Plaintiff's request that Shady Grove Road be declared a public road and the Plaintiff's request for a declaration of an easement by grant are denied.

AND IT IS SO ORDERED.

Joseph M. Strickland
Master in Equity for Richland County

**FINAL ORDER GRANTING RELIEF
THROUGH AN EASEMENT BY GRANT**

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND) IN THE COURT OF COMMON PLEAS

Country Properties, LLC,)

Plaintiff,)

vs.)

Nancy Dunn Martin,)

Defendant.)

Final Order

Hearing Date:

March 21-24, 2016

Judge:

Joseph M. Strickland

Court Reporter:

Amanda Creel Godfrey

Attorney for Plaintiff:

John W. Wells

Attorney for Defendant:

Joey R. Floyd

"I regard this case as one of the very greatest importance, the decision of which will control in a measure, one of the most constantly recurring grounds of controversy in reference to a right which is held to as tenaciously, and asserted as vigorously, as the recognized love of the Anglo Saxon for his land: The right to the use of a road. I have accordingly given it my most earnest and laborious consideration." Justice Cothran writing for the majority in Brasington v. Williams 143 S.C. 223, 141 S.E. 375 (1927).

This action is one brought by the Plaintiff to establish an easement across one property of the Defendant serving the property of the Plaintiff. The property of the Plaintiff, described herein below, will sometimes be referred to as the dominant estate and the property of the Defendant, also described herein below, will sometimes be referred to as the servient estate.

This case was commenced by the filing of a Summons and Complaint on March 18, 2014, seeking an easement across the lands of the Defendant on three separate theories, to wit; easement by deed; a private easement arising at law by prescription; and an easement by virtue of the fact that the road identified by the Plaintiff through the property of the Defendant is a public road. The Defendant filed and served her Answer and Counterclaim asserting various defenses including a general denial of the allegations by the Plaintiff; that the Plaintiff's claims are barred by the Statute of Limitations, abandonment of the easement and adverse possession of the easement by the Defendant. The Plaintiff filed a Reply which is a general denial of the allegations of the Defendant's Counterclaim.

This action was referred to me by a Consent Order of Referee of the Honorable L. Casey Manning dated July 7, 2014. Discovery was conducted by both sides, and the matter was set for trial during the week of March 21, 2016.

The Plaintiff appeared at the hearing in the person of James F. Podell, a member and principal of the Plaintiff limited liability company, represented by John W. Wells, its counsel of record. The Defendant appeared represented by Joey R. Floyd and Wesley D. Peel, both of whom have appeared as counsel of record for the Defendant. The case was tried before me without a jury.

FINDINGS OF FACT

1. That the Plaintiff is a limited liability company formed under the laws of the State of South Carolina with its principal place of business in the County of Richland, State of South Carolina.

2. That the Defendant is a citizen and resident of the County of Richland, State of South Carolina.

3. That the Plaintiff is the owner of a certain tract of land located partly in Kershaw County and partly in Richland County which was conveyed to the Plaintiff by deed of Pine Ridge Investments, LLC, dated March 11, 2009, and recorded in the RMC office for Richland County in Book 1515, at page 1554, the same being also filed in the ROD office for Kershaw County, the tract being described as follows:

All that piece, parcel or lot of land, with improvements thereon, if any, lying, situate and being in the State of South Carolina, Counties of Richland and Kershaw, located approximately ten (10) miles South of Lugoff, containing 1,023.07 acres, more or less, and being shown and described on a plat prepared for Gonzales Land and Timber, LLC, by Michael R. Mills, P.L.S., dated June 22, 2004, and recorded in the office of the ROD for Richland County in Book "951", at page 1618 and recorded in the office of the ROD for Kershaw County in Book "3121", at page 7. Said plat is incorporated herein by reference for a more complete and accurate description.

The 1,023.07 acres is split between Richland County, containing 383.63 acres and Kershaw County containing 640.07 acres.

4. That the Defendant is the owner of several tracts of land located in the County of Richland, State of South Carolina described as follows:

PARCEL 1:

All that certain piece, parcel or tract of land, situate, lying and being near Raglin Creek, east of U.S. Highway 601, in School District No. 2, in the County of Richland, and State of South Carolina, containing Sixty-Five and 06/100ths (65.06) acres, more or less, and bounded as follows: to wit: On the NORTH by property now or formerly of R. W. Lloyd; on the EAST by property now or formerly of R. W. Lloyd; on the SOUTHEAST and SOUTH by property now or formerly of Astor V. Cleveland; and on the WEST by property now or formerly of Jessie Dunn Martin; said tract will more fully appear reference to a plat prepared for Rufus D. Lewis, Jr., by Edward R. Owens, R.L.S., dated October 18, 1976. Be all measurements a little more or less.

TMS# 38000-03-08 and 38000-03-08

This being the same property conveyed to the Defendant by deed of Laura Jane Lewis Allen, et al. dated November 15, 2012, and recorded in the RMC for Richland County in Book 1813, at page 244.

PARCEL 2:

All that certain piece, parcel or lot of land with improvements thereon, situate, lying and being in the County of Richland, State of South Carolina, being shown and designated as Parcels 3, 4, 5, and 6, containing in the aggregate 164.0 acres, more or less, as shown on a plat surveyed for Heirs of Osie E. Martin by Jas. C. Covington, C.E., dated October 8, 1930, and recorded in the office of the RMC for Richland County in Plat Book R, at page 199; said parcels having such boundaries and measurements as shown on said plat which are specifically incorporated herein by reference thereto.

TMS # R38000-03-07 & R38000-03-15

ALSO: All that certain piece, parcel or lot of land, situate, lying and being about 23 miles east of the City of Columbia, and about one mile east of State Highway No. 26, now known as U.S. Hwy. 601, in the County of Richland, State of South Carolina, being more particularly shown as a portion of Tract 1 and 2 on a plat of land surveyed for the heirs of Mrs. Osie E. Martin by James C. Covington, C.E. dated October 8, 1930, recorded in the office of the Clerk of Court for Richland County in Plat Book R, at page 199; said property being more particularly shown and delineated as 23.20 acres on a plat prepared for Neal H. Higgins and Karen J. Higgins by W. Frank McAulay, Jr., PLS# 3124, dated January 6, 1995, recorded in Plat Book 55, at page 7626, and having such shapes, courses, distances, metes and bounds as shown upon said latter plat, reference being craved thereto as often as necessary for a more complete and accurate description; be all measurements a little more or less.

TMS #: R38000-03-06

ALSO: All that certain piece, parcel or lot of land, situate, lying and being about 23 miles east of the City of Columbia, and about one mile east of State Highway No. 26, now known as U. S. Hwy. 601, in the County of Richland, State of South Carolina, being more particularly shown as a portion of Tract 2 on a plat of land surveyed for the heirs of Mrs. Osie E. Martin by James C. Covington, C.E., dated October 8, 1930, recorded in the office of the Clerk of Court for Richland County in Plat Book R, at page 199; said property being more particularly shown and delineated as 23.30 acres on a plat prepared for Van A. Higgins and Linda L. Higgins by W. Frank McAulay, Jr., PLS# 3124, dated January 6, 1995, recorded May 19, 1995 in Plat Book 55, at page 7627, and having such shapes, courses, distances, metes and bounds as shown upon said latter plat, reference being craved thereto as often as necessary for a more complete and accurate description; be all measurements a little more or less.

TMS# R3800-03-48

Parcel 2 was conveyed to the Defendant by Corrective Limited Warranty Fiduciary Deed of Dorothy Martin Tate and Nancy Dunn Martin as successor co-trustees of the Edward Frank Martin, Jr., Trust dated August 5, 2004, dated December 13, 2007, and recorded in the RMC office for Richland County in Book 1384, at page 3241. This corrective deed corrected a deed from the same grantor to the same grantee dated August 9, 2007, and recorded in the RMC office for Richland County on September 20, 2007, in Book 1359, at page 2178.

5. That the Plaintiff's tract is divided by Raglin Creek, which flows generally from west to east, and serves as the county line between Kershaw County to the north of the Creek and Richland County to the south of the creek. According to the property description in the Plaintiff's deed, approximately 384 acres of the Plaintiff's property is located south of Raglin Creek in Richland County, and approximately 640 acres of the Plaintiff's property lies to the north of Raglin Creek in Kershaw County.

6. That the Plaintiff's tract has road frontage on U. S. Highway 601 above Raglin Creek in Kershaw County, but the Plaintiff's tract has no public road access south of Raglin Creek. To the extent that Raglin Creek is a natural barrier to ingress and egress, the 384 acres of the Plaintiff's tract located south of Raglin Creek in Richland County has no access except via the easement that the Plaintiff seeks to establish in this action.

7. I find from the testimony presented at trial that at some point several years before the plaintiff purchased his property in March of 2009, Pine Ridge Investments, LLC, the Plaintiff's predecessor in title, built a dam across Raglin Creek with a narrow road across the top of the dam. After the Plaintiff purchased the property, it improved the dam somewhat, making it safe for a vehicle to cross, but the dam has been damaged by storms, as it appears from a photograph,

Plaintiff's Exhibit 37, showing a gap eroded from the dam, and during the historic rains of October 2015, the dam washed out completely. I find as a matter of fact from the greater weight of all of the testimony presented, that Raglin Creek is a substantial natural barrier to the Plaintiff's ability to access the 384 acres of its property south of Raglin Creek in Richland County, and while the property south of Raglin Creek can be accessed by foot and has at times been accessible by personal vehicle, the natural barrier of the creek does limit the Plaintiff's ability to access its lands south of the creek, particularly with large vehicles and equipment necessary to harvest timber on the lands in Richland County south of Raglin Creek.

8. That the Plaintiff's use of its tract is for recreation including hunting and fishing, and for growing and harvesting timber. This has been the historical use of the tract by all of the Plaintiff's predecessors in title during the time period relevant to this case.

9. That the use by the Defendant and her predecessors in title of her tract of land has been for recreation including hunting and, growing and harvesting timber.

10. That there is a dirt road leading from Highway U. S. 601 to the southern boundary of the Plaintiff's tract and extending through the Plaintiff's tract to property owned by James L. Guy, II. This road is located south of Raglin Creek and would provide access to the Plaintiff's 384 acres south of Raglin Creek but for a locked gate on the Defendant's property where the road passes through the Defendant's tract. This locked gate is the source of the controversy in this case.

11. That the first 2,900 feet or so of the road in question from U. S. Highway 601 and proceeding eastward is maintained by Richland County. Richland County has no record of any deeded easement to this portion of the road maintained by it and provides maintenance to that

portion of the road under the legal theory that an easement by prescription in favor of the public has arisen over time from the continuous and adverse use of the road by the public. The county maintained portion of Northeast Shady Grove Road extends eastward from U. S. Highway 601 past the Defendant's western property line and ends on the Defendant's property. The end of county maintenance sign on Northeast Shady Grove Road is just inside the Defendant's property.

12. That Richland County has named the portion of the road maintained by it Northeast Shady Grove Road.

13. That the dirt road in question is shown on the 2004 plat by Michael Mills of Glenn and Associates, Plaintiff's Exhibit 2, as Shady Grove Road and Dirt Woods Road. It is shown on the 1998 Robert H. Lackey Surveying, Inc. plat, Plaintiff's Exhibit 6, as N.E. Shady Grove Road and Existing Woods Road. It is shown on the 1969 Fred J. Hager plat, Plaintiff's Exhibit 8, as Woods Road. It is shown on the 1957 plat for Powe Veneer Company, Plaintiff's Exhibit 10, as Camp Road. All of these plats show a dirt road extending from U. S. Highway 601 eastward below Raglin Creek through the Defendant's tract to the lands of the Plaintiff and then extending to the Guy Property east of the Plaintiff's tract.

14. The road in question appears on aerial photographs from 2013, Plaintiff's Exhibit 42; 1981, Plaintiff's Exhibit 43; 1970, Plaintiff's Exhibit 44; 1951, Plaintiff's Exhibit 45; and 1943, Plaintiff's Exhibit 46. These aerial photographs show a road in the same location as the road depicted in the above mentioned plats. The road was receiving enough use to resist the overgrowth of vegetation and remain visible from the air from 1943 to 2013.

15. The road in question is shown as a light duty road on 1953 Leesburg Quadrangle Map prepared by the United States Department of the Interior Geological Survey, Plaintiff's Exhibit 41.

16. The road in question is shown on a 1939 map prepared by the South Carolina Highway Department, Plaintiff's Exhibit 49. On this map, it is shown as a double solid line, whereas private roads are depicted on this map by a dotted line, indicating that the South Carolina Highway Department considered the entire road back to the Plaintiff's property to be a public road in 1939.

17. That the Defendant's property includes a tract containing 213.53 acres as shown on a plat prepared by Bostick Surveying for Nancy D. Martin dated February 15, 2010, Plaintiff's Exhibit 22, and an adjacent tract, sometimes referred to as the Lewis Tract, containing 64.68 acres as shown on a plat prepared by Bostick Surveying for Nancy D. Martin, et al. dated September 9, 2012, Plaintiff's Exhibit 23. Both plats show the disputed portion of the road in question and label it Black Dog Road.

18. That the 213.53 acre tract shown on Plaintiff's Exhibit 22 was conveyed to the Defendant on August 9, 2007, by the trustees of the Edward Frank Martin, Jr. Trust, Plaintiff's Exhibit 24.

19. That the 213.53 acre tract shown on Plaintiff's Exhibit 22 was passed down to the Defendant's father, Edward Frank Martin, Jr. through his mother and sisters from his father, Edward Frank Martin, Sr. who died owning it on December 15, 1967.

20. That Edward Frank Martin, Sr. obtained this tract from Florence Martin Van Herten by deed dated December 29, 1939, Plaintiff's Exhibit 27, which deed imposes a twenty (20) foot

permanent right of way on the property "from said road running through the plantation back to the lands of J. H. and Ella T. Miller."

21. That the easement in favor of J. H. and Ella T. Miller derives from a deed by J. H. Miller to Ossee M. Martin dated November 18, 1918 reserving the identical easement over the lands now owned by the Defendant, Plaintiff's Exhibit 29.

22. That the lands of J. H. and Ella T. Miller, referred to in Plaintiff's Exhibit 27 as the tracts served by the twenty (20) foot right of way, are now a portion of the Plaintiff's tract south of Raglin Creek.

23. That the only road fitting the description in Plaintiff's Exhibit 27 running through the Defendant's property to the Plaintiff's property, which is shown on the 1939 South Carolina Highway Department Map, Plaintiff's Exhibit 49, and the 1943 aerial photograph, Plaintiff's Exhibit 46, is the disputed portion of Northeast Shady Grove Road.

24. That as to the 64.68 acre tract owned by the Defendant shown on Plaintiff's Exhibit 23, it is shown as 65.61 acres on a plat prepared for the Estate of F. R. Martin by Keels Engineering Company dated May 25, 1970, Plaintiff's Exhibit 35.

25. That according to the August 15, 1971 deed from Sara Martin Goff et al. to Joe Earl Taylor et al., Plaintiff's Exhibit 33, this tract of the Defendant is identical to the tract conveyed to Fletcher R. Martin by the heirs of Mattie L. C. Desportes by deed dated September 24, 1948, Plaintiff's Exhibit 36, which deed describes and conveys Tract E from the 1884 plat of the property partitioned in the 1885 lawsuit of Mattie L. C. Desportes v. John A. Myers et al., the 1884 plat being Plaintiff's Exhibit 19.

26. That on December 21, 1926, Mattie L. C. Desportes was the owner of Tract E (now the Defendant's 64.68 acre tract acquired from Lewis in 2012) when the said Mattie L. C. Desportes signed a deed to the Plaintiff's predecessor in title, Lura Mae Kinsland, Plaintiff's Exhibit 16, conveying to Kinsland Tract 1 from the 1884 partition suit, Plaintiff's Exhibit 19, when she imposed upon Tract E:

"also convenient rights of way for cart and wagon road over the lands of the parties of the first part and each of them to the Burney lands, the Martin lands, and the English lands for the purposes of ingress and egress and access from the public road to such tracts of land. Said grantee, her heirs and assigns shall also have the right to construct and use cart and wagon roads connecting the said tracts of land hereby conveyed with each other by the nearest convenient route, the present roads upon said lands to be followed where (illegible) and no lands at present under cultivation to be taken for roads without compensation being made for the same. **The said rights of way to be appurtenant to and pass by conveyance of the tracts of land above described.** The said right of way not to exceed twenty feet in width (illegible)." (Emphasis added)

27. That the tracts conveyed to Kinsland by Mattie L. C. Desportes, J. H. Miller and Ella T. Miller, formerly Ella Black, were Tract 1, Tract 2 and Tract 4 from the 1884 partition plat, Plaintiff's Exhibit 19, which now form the southeastern corner of the Plaintiff's tract, and the easement conveyed in Plaintiff's Exhibit 16 was for the purpose of giving those tracts now owned by the Plaintiff access to the public road.

28. That on December 21, 1926 when they signed the deed to Lura Mae Kinsland, Plaintiff's Exhibit 16, conveying Tracts 2 and 4 from the 1884 partition plat together with the rights of way to reach those lands which are now a part of the Plaintiff's tract, J. H. Miller and Ella T. Miller owned and through Plaintiff's Exhibit 16 conveyed to Kinsland, her heirs and assigns the right of way over the Defendant's tract described in the November 18, 1918 deed to Ossee M. Martin,

Plaintiff's Exhibit 29, and later described on the deed to the Defendant's grandfather, Plaintiff's Exhibit 27.

29. I find by a preponderance of the evidence that the Plaintiff's Exhibit 16 conveyed the twenty (20) foot easement on the Defendant's 213 acre tract shown on the 2010 Bostick Plat, Plaintiff's Exhibit 22, and the easement over the Defendant's 64.68 acre tract shown on the 2012 Bostick Plat, Plaintiff's Exhibit 23, to Lura Mae Kinsland, the Plaintiff's predecessor in title, and expressly made both easements into appurtenances to pass by conveyance of Tracts 1, 2, and 4 from the 1884 partition plat which are now part of the Plaintiff's tract.

30. I find that both easements imposed on both of the Defendant's tracts flowed to the Plaintiff by and through the language "Together with all and singular, the rights, members, hereditaments, appurtenances to the said premises belonging or in anywise incident appertaining," which language is found in each deed in the Plaintiff's chain of title and which language was meant to convey the said easements, which were appurtenances to the Plaintiff's tract.

31. That at the time of the research of Shady Grove Road performed by Michael Mills in 2014, both easement deeds cited above were greater than sixty years old and therefore outside of the scope of a sixty year title search, which is the standard of practice for title searches in South Carolina, although many real estate attorneys now use a forty year standard. This explains why Michael Mills testified that he did not discover an easement to Shady Grove Road.

32. I find that the Defendant has failed to prove by clear and convincing evidence that she has adversely possessed the road for a ten (10) year period. The Plaintiff produced witnesses

who testified to using the road adversely to the Defendant's interests within a ten (10) year period prior to the filing of the lawsuit.

CONCLUSIONS OF LAW

EASEMENT BY GRANT

The standard of proof applicable to establishing an easement by grant, has not been elevated to a higher standard of proof than the preponderance of the evidence standard applied generally in civil actions in South Carolina.

As a result of an 1885 partition suit, J. H. Miller became the owner of Tract D shown on the 1885 partition plat, Plaintiff's Exhibit 19, which became the greatest part of the Defendant's primary 213 acre tract, and the same J. H. Miller owned Tract 2 on Plaintiff's Exhibit 9, which became a portion of the Plaintiff's tract below Raglin Creek. Ella T. Miller, the wife of J. H. Miller, got Tract F and Tract 4 in the same partition suit, which later became a portion of the Plaintiff's tract. Mattie L. C. Desportes got Tract E, which became the Defendant's 64.68 acre tract, and Tract 1, which became the southeastern most portion of the Plaintiffs tract, all as shown on the 1884 plat, Plaintiff's Exhibit 19.

In 1918 J. H. Miller sold Tract D to one Ossee Martin, Plaintiff's Exhibit 29, but because he still owned Tract 2 and his wife, Ella, still owned Tracts F and 4, J. H. Miller was careful to reserve for himself and his wife a twenty (20) foot easement through Tract D to provide access to Tract F, Tract 2 and Tract 4 that later became part of the Plaintiff's tract below Raglin Creek.

On December 21, 1926, J. H. Miller conveyed Tract 2, Ella T. Miller conveyed Tract 4, and Mattie L. C. Desportes conveyed Tract 1 from the 1884 partition plat to the Plaintiff's predecessor in title, Lura Mae Kinsland. In order to provide access to Tracts 1, 2, and 4, all of

which are part of the Plaintiff's tract, the 1926 deed to Lura Mae Kinsland grants a right of way over the cart and wagon roads owned and controlled by the grantors, J. H. Miller, Ella T. Miller, and Mattie L. C. Desportes leading to and providing access to these tracts. At the time of the 1926 conveyance, Mattie L. C. Desportes still owned Tract E from the 1884 partition that later became the Defendant's 64.68 acre tract. J. H. Miller and Ella T. Miller owned in 1926 the twenty (20) foot right of way over Tract D, which is now the greater portion of 213 acre tract that had been reserved to them in the 1918 deed to Ossee Martin in order to provide access to the same Tracts 2 and 4 that they conveyed to Lura Mae Kinsland. In Plaintiff's Exhibit 16, the twenty (20) foot wide easement retained by J. H. Miller in his 1918 deed of Tract D to Ossee Martin, plus a right of way over Tract E, now the 64.68 acre Lewis tract owned by the Defendant, were granted with the stipulation that existing roads be used where possible. Plaintiff's Exhibit 16 conveys a twenty foot easement across both of the Defendant's tracts serving property that was to become the southeastern corner of the Plaintiff's tract, south of Raglin Creek in Richland County.

Also the 1926 Kinsland deed specifically provides that the rights of way conveyed by that deed were to become appurtenances to Tracts 1, 2, and 4' and pass by conveyance of said lands. Every deed from Lura Mae Kinsland to the Plaintiff in the chain of title conveying a portion of Tracts 1, 2, and 4, included the language, "Together with all and singular, the rights, members, hereditaments and appurtenances to said premises belonging or in any wise incident or appertaining." This language comes directly from §27-7-10 *South Carolina Code of Laws Ann.*, which sets forth the statutory deed form drafted by the General Assembly. It is not meaningless or flowery language to impress the reader. It means that the conveyance of lands also includes

appurtenances such as easements and rights of way that are necessary for the use and enjoyment of the land. In this case, the deeds in the Plaintiff's chain of title after the Lura Mae Kinsland deed, Plaintiff's Exhibit 16, conveyed the appurtenances from grantor to grantee, which included the easements and rights of way over the two tracts owned by the Defendant, which were necessary to provide access to these tracts. Therefore, I conclude as a matter of law that the Plaintiff has proved by a preponderance of the evidence that it has a twenty (20) foot wide easement by grant over the lands of the Defendant following the course of the only west to east road through the lands of the defendant to the lands of the Plaintiff, which is the disputed road. This is a private easement appurtenant in favor of the Plaintiff.

STATUTE OF LIMITATIONS

The statute of limitations applicable to prescriptive easement actions is ten (10) years from the time the easement is obstructed. §15-3-340 *South Carolina Code of Laws Ann.* Bowen v. Team 6 Rich. 298, 40 S. C. L. 298 (1853). The ten (10) year statute under current §15-3-340 *South Carolina Code of Laws Ann.* is the only statute of limitations that has ever been used in a prescriptive easement case. §15-3-360 *South Carolina Code of Laws Ann.* has never been applied in a prescriptive easement case, and it cannot be applied to a claim for prescriptive easement because the Claimant in a prescriptive easement case is forced to rely on multiple entries on the servient estate which must occur at least twenty (20) years prior to the filing of the lawsuit. If he files the action within one (1) year of each entry upon which he relies he will never have twenty (20) years of continuous use when filing the suit.

ADVERSE POSSESSION OF THE EASEMENT BY DEFENDANT

The Defendant has not adversely possessed the easement over Shady Grove Road, because she has not obstructed the adverse use of the road for the full ten (10) year period required under the Statute of Limitations §15-3-340 *South Carolina Code of Laws Ann.* and the common law. Bowen v. Team supra. The Plaintiff produced testimony of witnesses James Podell, Claude Campbell, Lafaye, Baker, Cate, Pickrel, Cecil Brazell, Mac Brazell, Mills and Guy to prove use of the disputed road within ten (10) years of the filing of suit. Adverse possession is the same legal issue as the running of the Statute of Limitations since the cause of action for adverse possession is based on the running of the ten (10) year Statute of Limitations.

Evidence of adverse use of the road by the Plaintiff and others within ten (10) years of the filing of the action defeats the Defendant's claim of adverse possession.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is ordered:

1. That the Plaintiff has a private twenty (20) foot wide easement across the lands of the Defendant to use the disputed portion of Northeast Shady Grove Road from the end of county maintenance sign to the Plaintiff's southern property line as shown on the 2004 Gonzales plat, Plaintiff's Exhibit 2. The Defendant is enjoined from obstructing the Plaintiff's use of the road by a locked gate or any other device. To the extent that the Defendant keeps a gate across said road, the Defendant is ordered to provide the Plaintiff with a means of opening the gate such as a key or combination to any lock on the gate within thirty (30) days of the signing of this order. This easement is appurtenant to the tract now owned by the Plaintiff and shall run with the land to the Plaintiff's successors and assigns; and

2. The alternative relief sought by the Plaintiff, being a private easement by prescription and the declaration that the disputed road is a public road, is denied.

AND IT IS SO ORDERED.

Joseph M. Strickland
Master in Equity for Richland County

**FINAL ORDER GRANTING RELIEF
THROUGH A PUBLIC ROAD EASEMENT**

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND) IN THE COURT OF COMMON PLEAS

Country Properties, LLC,)

Plaintiff,)

vs.)

Nancy Dunn Martin,)

Defendant.)

Final Order

Hearing Date:

March 21-24, 2016

Judge:

Joseph M. Strickland

Court Reporter:

Amanda Creel Godfrey

Attorney for Plaintiff:

John W. Wells

Attorney for Defendant:

Joey R. Floyd

"I regard this case as one of the very greatest importance, the decision of which will control in a measure, one of the most constantly recurring grounds of controversy in reference to a right which is held to as tenaciously, and asserted as vigorously, as the recognized love of the Anglo Saxon for his land: The right to the use of a road. I have accordingly given it my most earnest and laborious consideration." Justice Cothran writing for the majority in Brasington v. Williams 143 S.C. 223, 141 S.E. 375 (1927).

This action is one brought by the Plaintiff to establish an easement across one property of the Defendant serving the property of the Plaintiff. The property of the Plaintiff, described herein below, will sometimes be referred to as the dominant estate and the property of the Defendant, also described herein below, will sometimes be referred to as the servient estate.

This case was commenced by the filing of a Summons and Complaint on March 18, 2014, seeking an easement across the lands of the Defendant on three separate theories, to wit; easement by deed; a private easement arising at law by prescription; and an easement by virtue of the fact that the road identified by the Plaintiff through the property of the Defendant is a public road. The Defendant filed and served her Answer and Counterclaim asserting various defenses including a general denial of the allegations by the Plaintiff; that the Plaintiff's claims are barred by the Statute of Limitations, abandonment of the easement and adverse possession of the easement by the Defendant. The Plaintiff filed a Reply which is a general denial of the allegations of the Defendant's Counterclaim.

This action was referred to me by a Consent Order of Referee of the Honorable L. Casey Manning dated July 7, 2014. Discovery was conducted by both sides, and the matter was set for trial during the week of March 21, 2016.

The Plaintiff appeared at the hearing in the person of James F. Podell, a member and principal of the Plaintiff limited liability company, represented by John W. Wells, its counsel of record. The Defendant appeared represented by Joey R. Floyd and Wesley D. Peel, both of whom have appeared as counsel of record for the Defendant. The case was tried before me without a jury.

FINDINGS OF FACT

1. That the Plaintiff is a limited liability company formed under the laws of the State of South Carolina with its principal place of business in the County of Richland, State of South Carolina.

2. That the Defendant is a citizen and resident of the County of Richland, State of South Carolina.
3. That the Plaintiff is the owner of a certain tract of land located partly in Kershaw County and partly in Richland County which was conveyed to the Plaintiff by deed of Pine Ridge Investments, LLC, dated March 11, 2009, and recorded in the RMC office for Richland County in Book 1515, at page 1554, the same being also filed in the ROD office for Kershaw County, the tract being described as follows:

All that piece, parcel or lot of land, with improvements thereon, if any, lying, situate and being in the State of South Carolina, Counties of Richland and Kershaw, located approximately ten (10) miles South of Lugoff, containing 1,023.07 acres, more or less, and being shown and described on a plat prepared for Gonzales Land and Timber, LLC, by Michael R. Mills, P.L.S., dated June 22, 2004, and recorded in the office of the ROD for Richland County in Book "951", at page 1618 and recorded in the office of the ROD for Kershaw County in Book "3121", at page 7. Said plat is incorporated herein by reference for a more complete and accurate description.

The 1,023.07 acres is split between Richland County, containing 383.63 acres and Kershaw County containing 640.07 acres.

4. That the Defendant is the owner of several tracts of land located in the County of Richland, State of South Carolina described as follows:

PARCEL 1:

All that certain piece, parcel or tract of land, situate, lying and being near Raglin Creek, east of U.S. Highway 601, in School District No. 2, in the County of Richland, and State of South Carolina, containing Sixty-Five and 06/100ths (65.06) acres, more or less, and bounded as follows: to wit: On the NORTH by property now or formerly of R. W. Lloyd; on the EAST by property now or formerly of R. W. Lloyd; on the SOUTHEAST and SOUTH by property now or formerly of Astor V. Cleveland; and on the WEST by property now or formerly of Jessie Dunn Martin; said tract will more fully appear reference to a plat prepared for Rufus D. Lewis, Jr., by Edward R. Owens, R.L.S., dated October 18, 1976. Be all measurements a little more or less.

TMS# 38000-03-08 and 38000-03-08

This being the same property conveyed to the Defendant by deed of Laura Jane Lewis Allen, et al. dated November 15, 2012, and recorded in the RMC for Richland County in Book 1813, at page 244.

PARCEL 2:

All that certain piece, parcel or lot of land with improvements thereon, situate, lying and being in the County of Richland, State of South Carolina, being shown and designated as Parcels 3, 4, 5, and 6, containing in the aggregate 164.0 acres, more or less, as shown on a plat surveyed for Heirs of Osie E. Martin by Jas. C. Covington, C.E., dated October 8, 1930, and recorded in the office of the RMC for Richland County in Plat Book R, at page 199; said parcels having such boundaries and measurements as shown on said plat which are specifically incorporated herein by reference thereto.

TMS # R38000-03-07 & R38000-03-15

ALSO: All that certain piece, parcel or lot of land, situate, lying and being about 23 miles east of the City of Columbia, and about one mile east of State Highway No. 26, now known as U.S. Hwy. 601, in the County of Richland, State of South Carolina, being more particularly shown as a portion of Tract 1 and 2 on a plat of land surveyed for the heirs of Mrs. Osie E. Martin by James C. Covington, C.E. dated October 8, 1930, recorded in the office of the Clerk of Court for Richland County in Plat Book R, at page 199; said property being more particularly shown and delineated as 23.20 acres on a plat prepared for Neal H. Higgins and Karen J. Higgins by W. Frank McAulay, Jr., PLS# 3124, dated January 6, 1995, recorded in Plat Book 55, at page 7626, and having such shapes, courses, distances, metes and bounds as shown upon said latter plat, reference being craved thereto as often as necessary for a more complete and accurate description; be all measurements a little more or less.

TMS #: R38000-03-06

ALSO: All that certain piece, parcel or lot of land, situate, lying and being about 23 miles east of the City of Columbia, and about one mile east of State Highway No. 26, now known as U. S. Hwy. 601, in the County of Richland, State of South Carolina, being more particularly shown as a portion of Tract 2 on a plat of land surveyed for the heirs of Mrs. Osie E. Martin by James C. Covington, C.E., dated October 8, 1930, recorded in the office of the Clerk of Court for Richland County in Plat Book R, at page 199; said property being more particularly shown and delineated as 23.30 acres on a plat prepared for Van A. Higgins and Linda L. Higgins by W. Frank McAulay, Jr., PLS# 3124, dated January 6, 1995, recorded May 19, 1995 in Plat Book 55, at page 7627, and having such shapes, courses, distances, metes and bounds as shown upon said latter plat, reference being craved thereto as often as necessary for a more complete and accurate description; be all measurements a little more or less.

TMS# R3800-03-48

Parcel 2 was conveyed to the Defendant by Corrective Limited Warranty Fiduciary Deed of Dorothy Martin Tate and Nancy Dunn Martin as successor co-trustees of the Edward Frank Martin, Jr., Trust dated August 5, 2004, dated December 13, 2007, and recorded in the RMC office for Richland County in Book 1384, at page 3241. This corrective deed corrected a deed from the same grantor to the same grantee dated August 9, 2007, and recorded in the RMC office for Richland County on September 20, 2007, in Book 1359, at page 2178.

5. That the Plaintiff's tract is divided by Raglin Creek, which flows generally from west to east, and serves as the county line between Kershaw County to the north of the Creek and Richland County to the south of the creek. According to the property description in the Plaintiff's deed, approximately 384 acres of the Plaintiff's property is located south of Raglin Creek in Richland County, and approximately 640 acres of the Plaintiff's property lies to the north of Raglin Creek in Kershaw County.

6. That the Plaintiff's tract has road frontage on U. S. Highway 601 above Raglin Creek in Kershaw County, but the Plaintiff's tract has no public road access south of Raglin Creek. To the extent that Raglin Creek is a natural barrier to ingress and egress, the 384 acres of the Plaintiff's tract located south of Raglin Creek in Richland County has no access except via the easement that the Plaintiff seeks to establish in this action.

7. I find from the testimony presented at trial that at some point several years before the plaintiff purchased his property in March of 2009, Pine Ridge Investments, LLC, the Plaintiff's predecessor in title, built a dam across Raglin Creek with a narrow road across the top of the dam. After the Plaintiff purchased the property, it improved the dam somewhat, making it safe for a vehicle to cross, but the dam has been damaged by storms, as it appears from a photograph,

Plaintiff's Exhibit 37, showing a gap eroded from the dam, and during the historic rains of October 2015, the dam washed out completely. I find as a matter of fact from the greater weight of all of the testimony presented, that Raglin Creek is a substantial natural barrier to the Plaintiff's ability to access the 384 acres of its property south of Raglin Creek in Richland County, and while the property south of Raglin Creek can be accessed by foot and has at times been accessible by personal vehicle, the natural barrier of the creek does limit the Plaintiff's ability to access its lands south of the creek, particularly with large vehicles and equipment necessary to harvest timber on the lands in Richland County south of Raglin Creek.

8. That the Plaintiff's use of its tract is for recreation including hunting and fishing, and for growing and harvesting timber. This has been the historical use of the tract by all of the Plaintiff's predecessors in title during the time period relevant to this case.

9. That the use by the Defendant and her predecessors in title of her tract of land has been for recreation including hunting and, growing and harvesting timber.

10. That there is a dirt road leading from Highway U. S. 601 to the southern boundary of the Plaintiff's tract and extending through the Plaintiff's tract to property owned by James L. Guy, II. This road is located south of Raglin Creek and would provide access to the Plaintiff's 384 acres south of Raglin Creek but for a locked gate on the Defendant's property where the road passes through the Defendant's tract. This locked gate is the source of the controversy in this case.

11. That the first 2,900 feet or so of the road in question from U. S. Highway 601 and proceeding eastward is maintained by Richland County. Richland County has no record of any deeded easement to this portion of the road maintained by it and provides maintenance to that

portion of the road under the legal theory that an easement by prescription in favor of the public has arisen over time from the continuous and adverse use of the road by the public. The county maintained portion of Northeast Shady Grove Road extends eastward from U. S. Highway 601 past the Defendant's western property line and ends on the Defendant's property. The end of county maintenance sign on Northeast Shady Grove Road is just inside the Defendant's property.

12. That Richland County has named the portion of the road maintained by it Northeast Shady Grove Road.

13. That the dirt road in question is shown on the 2004 plat by Michael Mills of Glenn and Associates, Plaintiff's Exhibit 2, as Shady Grove Road and Dirt Woods Road. It is shown on the 1998 Robert H. Lackey Surveying, Inc. plat, Plaintiff's Exhibit 6, as N.E. Shady Grove Road and Existing Woods Road. It is shown on the 1969 Fred J. Hager plat, Plaintiff's Exhibit 8, as Woods Road. It is shown on the 1957 plat for Powe Veneer Company, Plaintiff's Exhibit 10, as Camp Road. All of these plats show a dirt road extending from U. S. Highway 601 eastward below Raglin Creek through the Defendant's tract to the lands of the Plaintiff and then extending to the Guy Property east of the Plaintiff's tract.

14. The road in question appears on aerial photographs from 2013, Plaintiff's Exhibit 42; 1981, Plaintiff's Exhibit 43; 1970, Plaintiff's Exhibit 44; 1951, Plaintiff's Exhibit 45; and 1943, Plaintiff's Exhibit 46. These aerial photographs show a road in the same location as the road depicted in the above mentioned plats. The road was receiving enough use to resist the overgrowth of vegetation and remain visible from the air from 1943 to 2013.

15. The road in question is shown as a light duty road on 1953 Leesburg Quadrangle Map prepared by the United States Department of the Interior Geological Survey, Plaintiff's Exhibit 41.

16. The road in question is shown on a 1939 map prepared by the South Carolina Highway Department, Plaintiff's Exhibit 49. On this map, it is shown as a double solid line, whereas private roads are depicted on this map by a dotted line, indicating that the South Carolina Highway Department considered the entire road back to the Plaintiff's property to be a public road in 1939.

17. The Plaintiff produced no less than four witnesses who testified that the road in question had received public maintenance from Highway U. S. 601 to the Plaintiff's property line during the 1950s and 1960s.

18. That no party or government authority has petitioned any court or initiated any action to close or abandon any portion of the road in question that was previously maintained by the public or designated as a public road by the South Carolina Highway Department. No party has complied with the requirements of §57-9-10 South Carolina Code of Laws Annotated to abandon or close the road in question or any part thereof.

19. At this point, it would be useful to compare the history of the 2,900 foot portion of Northeast Shady Grove Road that currently receives maintenance services from Richland County (hereinafter county maintained portion) with the disputed portion of the road that lies east of the end of county maintenance sign, and up to and beyond the Plaintiff's southern property line (hereinafter the disputed portion). According to the combined testimony of witnesses Algine Campbell, W. D. Kirkland, Bennie Higgins and Angus Lafaye, both the county maintained

portion and the disputed portion of the road in question received public maintenance services from 1945 until at least 1969. Both portions of the road are equally indicated as a public road on the 1939 South Carolina Highway Department Map, Plaintiff's Exhibit 49. Both portions of the road are equally vivid and distinct on the 1943 aerial photograph, Plaintiff's Exhibit 46, and the 1970 aerial photograph, Plaintiff's Exhibit 44. There is ample testimony from witnesses Campbell, Kirkland and Higgins that they enjoyed unfettered use of both portions of the road as members of the public during the 1940s, 1950s, and 1960s. There is no evidence of a written or recorded easement conveying either portion to Richland County. There is no evidence of a formal dedication of either portion to the public for use as a public road. From 1945 until at least 1969, both portions of the road, the part now maintained by Richland County and the disputed portion, enjoyed equal status as a publicly maintained road.

In 1962, the South Carolina General Assembly enacted into law §57-9-10 South Carolina Code of Laws Annotated which requires any interested person or, the State or its political subdivisions to file a court action to close a road and to give notice of that court action to other landowners whose property would be affected by the road closing.

In about 1970 the Dunn's Mountain Hunt Club began to lease the hunting rights on the property now owned by the Defendant and property to the west of the Defendant's tract owned by a man named Higgins. The hunt club installed a steel gate across the road in question on the Higgins property in about 1970 according to the Defendant's witness, Gary Wessinger. That gate was later moved in 1982 eastward onto the property of the Defendant according to Wessinger. It appears that after the gate was installed, Richland County stopped maintaining the

disputed portion of the road while it continued to maintain the 2,900 foot portion of the road that it maintains today.

In summary, both the county maintained portion of the road and the disputed portion of the road were equally public until at least 1969. The statutory requirement for closing a public road became law in 1962 while both portions were under equal public maintenance and equal public use. The Dunn's Mountain Hunt Club, and later the Defendant's predecessor in title, began erecting gates across the road in 1970, but neither they nor Richland County complied with the statutory requirements for closing a public road. Therefore, the disputed portion of the road is still a public road because the legal requirement to close it to the public has never been met.

20. The compelling irony in this case is that the Defendant would be wholly without access to her property if the public easement to the first 2,900 feet of Northeast Shady Grove Road had not arisen at law from the very public maintenance and public use of the road described by the Plaintiff's witnesses. The Defendant readily accepts the benefit of the public easement providing access to her property, but seeks to deny that same benefit to the two landowners, the Plaintiff and Guy, whose lands are further down the road. If the public use and public maintenance were not as the Plaintiff's witnesses Campbell, Kirkland, Higgins and Lafaye testified that they were, the Defendant herself would be landlocked.

21. I find by strict, cogent and convincing evidence as set forth above that the continuous widespread public usage of the disputed portion of Northeast Shady Grove Road from 1945 through 1963, without challenge or interference from the previous owners of the Defendant's tract, establishes the public character of the road. This conclusion is fortified by the extent and

duration of the public maintenance performed on the disputed portion of Northeast Shady Grove Road from 1945 until 1969 which was equal in all respects to the public maintenance on the 2,900 foot section of the road that is currently maintained by Richland County as a prescriptive easement.

22. I find by strict, cogent and convincing evidence that Northeast Shady Grove Road was a public road from U. S. Highway 601 to the plaintiff's property line where, according to testimony of the Plaintiff's witnesses, the county motor grader turned around at until the first gate was erected in 1970.

23. I find by strict, cogent and convincing evidence that the §57-9-10 South Carolina Code of Laws Ann. requiring a judicial proceeding to abandon or close a public road was in effect in 1970 when the first gate was put up on Northeast Shady Grove Road.

24. I find by strict, cogent and convincing evidence that the judicial proceeding required under §57-9-10 South Carolina Code of Laws Annotated to close the disputed portion of Northeast Shady Grove Road and to cut off the Plaintiff's legal right to use the disputed portion of the road has never been filed.

25. I find that the Defendant has failed to prove by clear and convincing evidence that she has adversely possessed the road for a ten (10) year period. The Plaintiff produced witnesses who testified to using the road adversely to the Defendant's interests within a ten (10) year period prior to the filing of the lawsuit.

CONCLUSIONS OF LAW

PUBLIC EASEMENT BY DEDICATION

Dedication requires two elements. First, the owner must express in a positive and unmistakable manner the intention to dedicate his property to public use. Horry County v. Laychur 315 S.C. 364, 434 S. E 2d 259 (1993). Second, there must be within a reasonable time, an express or implied public acceptance of the property offered for dedication. Helsel v. City of North Myrtle Beach 307 S. C. 24, 413 S. E. 2d 821 (1992). Even though a land owner must positively and unmistakably express his or her intention to dedicate property, the intent to dedicate may be implied from allowing lengthy public use of the land. Cleland v. Westvaco Corp. 314 S. C. 508, 431 S. E. 2d 264 (Ct. App. 1993). No formal acceptance of the land by a public authority is necessary to complete the dedication; acceptance may be implied by the public's continuous use of the property. Boyd v. Hyatt 294 S. C. 360, 364 S. E. 2d 478 (Ct. App. 1988). Acceptance of offer of dedication also may be recognized through a public authority's using, repairing or working the streets. Helsel v. City of North Myrtle Beach supra.

The public easement by dedication where the dedication is proved by the owner's acquiescence in public use and maintenance of the road, and the acceptance of the dedication is proved by public maintenance of the road, is similar to a prescriptive easement in favor of the public but the elements are not identical.

In a public dedication case, the twenty (20) year use period for use by the public does not apply. "Where there has been an intended dedication by the owner of the property, no specific duration of use is required to show acceptance. The sufficiency of the use depends on the

circumstances of each case.” Boyd v. Hyatt supra. (finding public use for 13 years sufficient evidence of acceptance by the public)

The standard of proof for a public dedication of a right of way is strict, cogent and convincing evidence. Mack v. Edens 320 S. C. 236, 464 S. E, 2d 124 (1995).

As to the manifest intent of the Defendant’s and her predecessors in title to dedicate the disputed road for public use, the Plaintiff produced testimony that the disputed road was open to the public and used by members of the public having no association with the Plaintiff’s property or the Defendant’s property from 1944 until 1963 or 1964. Witnesses Campbell, Kirkland, and Higgins testified that the disputed road was well maintained by county road scrapers during this time period. “The roads were like a super highway back then,” according to W. D. Kirkland (Transcript p. 186). Witness Angus Lafaye testified that the county did maintenance on the disputed road when he did forestry work on the Plaintiff’s tract in 1968 and 1969 when it was owned by Richard Lloyd. So the Plaintiff has satisfied the public dedication requirement by presenting the uncontroverted testimony of members of the public who used the disputed road for a lengthy period of time. The Plaintiff has satisfied the public acceptance of the dedication requirement by presenting testimony that the disputed road received regular public maintenance from 1944 until at least 1969. The Plaintiff also introduced the 1939 South Carolina Highway Department Map showing the disputed road as a public road.

The disputed portion of Northeast Shady Grove Road and the portion now maintained by Richland County appear to have been equally public rights of way from 1939 until 1969 in terms of public use and public maintenance. The General Assembly passed a statute requiring a legal action to be filed in order to abandon or close a public road in 1962 while the disputed road was

still under county maintenance according to the testimony of the Plaintiff's witnesses. The Defendant's predecessors in title began erecting gates on the road in 1970, but they never filed the legal action required by §57-9-10 *South Carolina Code of Laws Ann.* Having failed to comply with the requirements of notice and due process mandated by the State in order to abandon a public road, the Defendant and her predecessors in title have failed to legally extinguish the public character of the road that it enjoyed in 1962 when §57-9-10 was enacted. Therefore I conclude as a matter of law that the disputed portion of Northeast Shady Grove Road from the end of county maintenance sign to the Plaintiff's property line is a public road until the Defendant or Richland County complies with the applicable statute to close it.

STATUTE OF LIMITATIONS

The statute of limitations applicable to prescriptive easement actions is ten (10) years from the time the easement is obstructed. §15-3-340 *South Carolina Code of Laws Ann.* Bowen v. Team 6 Rich. 298, 40 S. C. L. 298 (1853). The ten (10) year statute under current §15-3-340 *South Carolina Code of Laws Ann.* is the only statute of limitations that has ever been used in a prescriptive easement case. §15-3-360 *South Carolina Code of Laws Ann.* has never been applied in a prescriptive easement case, and it cannot be applied to a claim for prescriptive easement because the Claimant in a prescriptive easement case is forced to rely on multiple entries on the servient estate which must occur at least twenty (20) years prior to the filing of the lawsuit. If he files the action within one (1) year of each entry upon which he relies he will never have twenty (20) years of continuous use when filing the suit.

ADVERSE POSSESSION OF THE EASEMENT BY DEFENDANT

The Defendant has not adversely possessed the easement over Shady Grove Road, because she has not obstructed the adverse use of the road for the full ten (10) year period required under the Statute of Limitations §15-3-340 *South Carolina Code of Laws Ann.* and the common law. Bowen v. Team supra. The Plaintiff produced testimony of witnesses James Podell, Claude Campbell, Lafaye, Baker, Cate, Pickrel, Cecil Brazell, Mac Brazell, Mills and Guy to prove use of the disputed road within ten (10) years of the filing of suit. Adverse possession is the same legal issue as the running of the Statute of Limitations since the cause of action for adverse possession is based on the running of the ten (10) year Statute of Limitations.

Evidence of adverse use of the road by the Plaintiff and others within ten (10) years of the filing of the action defeats the Defendant's claim of adverse possession.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is ordered:

1. Northeast Shady Grove Road from the end of county maintenance sign to the Plaintiff's southern property line as shown on the 2004 Gonzales plat, Plaintiff's Exhibit 2, is declared to be a public road open to the public for use by the public, provided that Richland County is not required by this order to provide maintenance services to the portion of Northeast Shady Grove Road past its end of county maintenance sign. The Defendant is ordered to remove her gate from this road within thirty (30) days of the signing of this order; and
2. The alternative relief sought by the Plaintiff, being a private easement by prescription and a private easement by grant, is denied.

AND IT IS SO ORDERED.

Joseph M. Strickland
Master in Equity for Richland County

**FINAL ORDER GRANTING RELIEF ON ALL
THEORIES**

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Country Properties, LLC,)
Plaintiff,)
vs.)
Nancy Dunn Martin,)
Defendant.)

Final Order

Hearing Date: March 21-24, 2016
Judge: Joseph M. Strickland
Court Reporter: Amanda Creel Godfrey
Attorney for Plaintiff: John W. Wells
Attorney for Defendant: Joey R. Floyd

“I regard this case as one of the very greatest importance, the decision of which will control in a measure, one of the most constantly recurring grounds of controversy in reference to a right which is held to as tenaciously, and asserted as vigorously, as the recognized love of the Anglo Saxon for his land: The right to the use of a road. I have accordingly given it my most earnest and laborious consideration.” Justice Cothran writing for the majority in Brasington v. Williams 143 S.C. 223, 141 S.E. 375 (1927).

This action is one brought by the Plaintiff to establish an easement across one property of the Defendant serving the property of the Plaintiff. The property of the Plaintiff, described herein below, will sometimes be referred to as the dominant estate and the property of the Defendant, also described herein below, will sometimes be referred to as the servient estate.

This case was commenced by the filing of a Summons and Complaint on March 18, 2014, seeking an easement across the lands of the Defendant on three separate theories, to wit; easement by deed; a private easement arising at law by prescription; and an easement by virtue of the fact that the road identified by the Plaintiff through the property of the Defendant is a public road. The Defendant filed and served her Answer and Counterclaim asserting various defenses including a general denial of the allegations by the Plaintiff; that the Plaintiff's claims are barred by the Statute of Limitations, abandonment of the easement and adverse possession of the easement by the Defendant. The Plaintiff filed a Reply which is a general denial of the allegations of the Defendant's Counterclaim.

This action was referred to me by a Consent Order of Referee of the Honorable L. Casey Manning dated July 7, 2014. Discovery was conducted by both sides, and the matter was set for trial during the week of March 21, 2016.

The Plaintiff appeared at the hearing in the person of James F. Podell, a member and principal of the Plaintiff limited liability company, represented by John W. Wells, its counsel of record. The Defendant appeared represented by Joey R. Floyd and Wesley D. Peel, both of whom have appeared as counsel of record for the Defendant. The case was tried before me without a jury.

FINDINGS OF FACT

1. That the Plaintiff is a limited liability company formed under the laws of the State of South Carolina with its principal place of business in the County of Richland, State of South Carolina.

2. That the Defendant is a citizen and resident of the County of Richland, State of South Carolina.
3. That the Plaintiff is the owner of a certain tract of land located partly in Kershaw County and partly in Richland County which was conveyed to the Plaintiff by deed of Pine Ridge Investments, LLC, dated March 11, 2009, and recorded in the RMC office for Richland County in Book 1515, at page 1554, the same being also filed in the ROD office for Kershaw County, the tract being described as follows:

All that piece, parcel or lot of land, with improvements thereon, if any, lying, situate and being in the State of South Carolina, Counties of Richland and Kershaw, located approximately ten (10) miles South of Lugoff, containing 1,023.07 acres, more or less, and being shown and described on a plat prepared for Gonzales Land and Timber, LLC, by Michael R. Mills, P.L.S., dated June 22, 2004, and recorded in the office of the ROD for Richland County in Book "951", at page 1618 and recorded in the office of the ROD for Kershaw County in Book "3121", at page 7. Said plat is incorporated herein by reference for a more complete and accurate description.

The 1,023.07 acres is split between Richland County, containing 383.63 acres and Kershaw County containing 640.07 acres.

4. That the Defendant is the owner of several tracts of land located in the County of Richland, State of South Carolina described as follows:

PARCEL 1:

All that certain piece, parcel or tract of land, situate, lying and being near Raglin Creek, east of U.S. Highway 601, in School District No. 2, in the County of Richland, and State of South Carolina, containing Sixty-Five and 06/100ths (65.06) acres, more or less, and bounded as follows: to wit: On the NORTH by property now or formerly of R. W. Lloyd; on the EAST by property now or formerly of R. W. Lloyd; on the SOUTHEAST and SOUTH by property now or formerly Astor V. Cleveland; and on the WEST by property now or formerly of Jessie Dunn Martin; said tract will more fully appear reference to a plat prepared for Rufus D. Lewis, Jr., by Edward R. Owens, R.L.S., dated October 18, 1976. Be all measurements a little more or less.

TMS# 38000-03-08 and 38000-03-08

This being the same property conveyed to the Defendant by deed of Laura Jane Lewis Allen, et al. dated November 15, 2012, and recorded in the RMC for Richland County in Book 1813, at page 244.

PARCEL 2:

All that certain piece, parcel or lot of land with improvements thereon, situate, lying and being in the County of Richland, State of South Carolina, being shown and designated as Parcels 3, 4, 5, and 6, containing in the aggregate 164.0 acres, more or less, as shown on a plat surveyed for Heirs of Osie E. Martin by Jas. C. Covington, C.E., dated October 8, 1930, and recorded in the office of the RMC for Richland County in Plat Book R, at page 199; said parcels having such boundaries and measurements as shown on said plat which are specifically incorporated herein by reference thereto.

TMS # R38000-03-07 & R38000-03-15

ALSO: All that certain piece, parcel or lot of land, situate, lying and being about 23 miles east of the City of Columbia, and about one mile east of State Highway No. 26, now known as U.S. Hwy. 601, in the County of Richland, State of South Carolina, being more particularly shown as a portion of Tract 1 and 2 on a plat of land surveyed for the heirs of Mrs. Osie E. Martin by James C. Covington, C.E. dated October 8, 1930, recorded in the office of the Clerk of Court for Richland County in Plat Book R, at page 199; said property being more particularly shown and delineated as 23.20 acres on a plat prepared for Neal H. Higgins and Karen J. Higgins by W. Frank McAulay, Jr., PLS# 3124, dated January 6, 1995, recorded in Plat Book 55, at page 7626, and having such shapes, courses, distances, metes and bounds as shown upon said latter plat, reference being craved thereto as often as necessary for a more complete and accurate description; be all measurements a little more or less.

TMS #: R38000-03-06

ALSO: All that certain piece, parcel or lot of land, situate, lying and being about 23 miles east of the City of Columbia, and about one mile east of State Highway No. 26, now known as U. S. Hwy. 601, in the County of Richland, State of South Carolina, being more particularly shown as a portion of Tract 2 on a plat of land surveyed for the heirs of Mrs. Osie E. Martin by James C. Covington, C.E., dated October 8, 1930, recorded in the office of the Clerk of Court for Richland County in Plat Book R, at page 199; said property being more particularly shown and delineated as 23.30 acres on a plat prepared for Van A. Higgins and Linda L. Higgins by W. Frank McAulay, Jr., PLS# 3124, dated January 6, 1995, recorded May 19, 1995 in Plat Book 55, at page 7627, and having such shapes, courses, distances, metes and bounds as shown upon said latter plat, reference being craved thereto as often as necessary for a more complete and accurate description; be all measurements a little more or less.

TMS# R3800-03-48

Parcel 2 was conveyed to the Defendant by Corrective Limited Warranty Fiduciary Deed of Dorothy Martin Tate and Nancy Dunn Martin as successor co-trustees of the Edward Frank Martin, Jr., Trust dated August 5, 2004, dated December 13, 2007, and recorded in the RMC office for Richland County in Book 1384, at page 3241. This corrective deed corrected a deed from the same grantor to the same grantee dated August 9, 2007, and recorded in the RMC office for Richland County on September 20, 2007, in Book 1359, at page 2178.

5. That the Plaintiff's tract is divided by Raglin Creek, which flows generally from west to east, and serves as the county line between Kershaw County to the north of the Creek and Richland County to the south of the creek. According to the property description in the Plaintiff's deed, approximately 384 acres of the Plaintiff's property is located south of Raglin Creek in Richland County, and approximately 640 acres of the Plaintiff's property lies to the north of Raglin Creek in Kershaw County.

6. That the Plaintiff's tract has road frontage on U. S. Highway 601 above Raglin Creek in Kershaw County, but the Plaintiff's tract has no public road access south of Raglin Creek. To the extent that Raglin Creek is a natural barrier to ingress and egress, the 384 acres of the Plaintiff's tract located south of Raglin Creek in Richland County has no access except via the easement that the Plaintiff seeks to establish in this action.

7. I find from the testimony presented at trial that at some point several years before the plaintiff purchased his property in March of 2009, Pine Ridge Investments, LLC, the Plaintiff's predecessor in title, built a dam across Raglin Creek with a narrow road across the top of the dam. After the Plaintiff purchased the property, it improved the dam somewhat, making it safe for a vehicle to cross, but the dam has been damaged by storms, as it appears from a photograph,

Plaintiff's Exhibit 37, showing a gap eroded from the dam, and during the historic rains of October 2015, the dam washed out completely. I find as a matter of fact from the greater weight of all of the testimony presented, that Raglin Creek is a substantial natural barrier to the Plaintiff's ability to access the 384 acres of its property south of Raglin Creek in Richland County, and while the property south of Raglin Creek can be accessed by foot and has at times been accessible by personal vehicle, the natural barrier of the creek does limit the Plaintiff's ability to access its lands south of the creek, particularly with large vehicles and equipment necessary to harvest timber on the lands in Richland County south of Raglin Creek.

8. That the Plaintiff's use of its tract is for recreation including hunting and fishing, and for growing and harvesting timber. This has been the historical use of the tract by all of the Plaintiff's predecessors in title during the time period relevant to this case.

9. That the use by the Defendant and her predecessors in title of her tract of land has been for recreation including hunting and, growing and harvesting timber.

10. That there is a dirt road leading from Highway U. S. 601 to the southern boundary of the Plaintiff's tract and extending through the Plaintiff's tract to property owned by James L. Guy, II. This road is located south of Raglin Creek and would provide access to the Plaintiff's 384 acres south of Raglin Creek but for a locked gate on the Defendant's property where the road passes through the Defendant's tract. This locked gate is the source of the controversy in this case.

11. That the first 2,900 feet or so of the road in question from U. S. Highway 601 and proceeding eastward is maintained by Richland County. Richland County has no record of any deeded easement to this portion of the road maintained by it and provides maintenance to that

portion of the road under the legal theory that an easement by prescription in favor of the public has arisen over time from the continuous and adverse use of the road by the public. The county maintained portion of Northeast Shady Grove Road extends eastward from U. S. Highway 601 past the Defendant's western property line and ends on the Defendant's property. The end of county maintenance sign on Northeast Shady Grove Road is just inside the Defendant's property.

12. That Richland County has named the portion of the road maintained by it Northeast Shady Grove Road.

13. That the dirt road in question is shown on the 2004 plat by Michael Mills of Glenn and Associates, Plaintiff's Exhibit 2, as Shady Grove Road and Dirt Woods Road. It is shown on the 1998 Robert H. Lackey Surveying, Inc. plat, Plaintiff's Exhibit 6, as N.E. Shady Grove Road and Existing Woods Road. It is shown on the 1969 Fred J. Hager plat, Plaintiff's Exhibit 8, as Woods Road. It is shown on the 1957 plat for Powe Veneer Company, Plaintiff's Exhibit 10, as Camp Road. All of these plats show a dirt road extending from U. S. Highway 601 eastward below Raglin Creek through the Defendant's tract to the lands of the Plaintiff and then extending to the Guy Property east of the Plaintiff's tract.

14. The road in question appears on aerial photographs from 2013, Plaintiff's Exhibit 42; 1981, Plaintiff's Exhibit 43; 1970, Plaintiff's Exhibit 44; 1951, Plaintiff's Exhibit 45; and 1943, Plaintiff's Exhibit 46. These aerial photographs show a road in the same location as the road depicted in the above mentioned plats. The road was receiving enough use to resist the overgrowth of vegetation and remain visible from the air from 1943 to 2013.

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17. The Plaintiff produced no less than four witnesses who testified that the road in question had received public maintenance from Highway U. S. 601 to the Plaintiff's property line during the 1950s and 1960s.

18. That no party or government authority has petitioned any court or initiated any action to close or abandon any portion of the road in question that was previously maintained by the public or designated as a public road by the South Carolina Highway Department. No party has complied with the requirements of §57-9-10 South Carolina Code of Laws Annotated to abandon or close the road in question or any part thereof.

19. At this point, it would be useful to compare the history of the 2,900 foot portion of Northeast Shady Grove Road that currently receives maintenance services from Richland County (hereinafter county maintained portion) with the disputed portion of the road that lies east of the end of county maintenance sign, and up to and beyond the Plaintiff's southern property line (hereinafter the disputed portion). According to the combined testimony of witnesses Algine Campbell, W. D. Kirkland, Bennie Higgins and Angus Lafaye, both the county maintained

portion and the disputed portion of the road in question received public maintenance services from 1945 until at least 1969. Both portions of the road are equally indicated as a public road on the 1939 South Carolina Highway Department Map, Plaintiff's Exhibit 49. Both portions of the road are equally vivid and distinct on the 1943 aerial photograph, Plaintiff's Exhibit 46, and the 1970 aerial photograph, Plaintiff's Exhibit 44. There is ample testimony from witnesses Campbell, Kirkland and Higgins that they enjoyed unfettered use of both portions of the road as members of the public during the 1940s, 1950s, and 1960s. There is no evidence of a written or recorded easement conveying either portion to Richland County. There is no evidence of a formal dedication of either portion to the public for use as a public road. From 1945 until at least 1969, both portions of the road, the part now maintained by Richland County and the disputed portion, enjoyed equal status as a publicly maintained road.

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In about 1970 the Dunn's Mountain Hunt Club began to lease the hunting rights on the property now owned by the Defendant and property to the west of the Defendant's tract owned by a man named Higgins. The hunt club installed a steel gate across the road in question on the Higgins property in about 1970 according to the Defendant's witness, Gary Wessinger. That gate was later moved in 1982 eastward onto the property of the Defendant according to Wessinger. It appears that after the gate was installed, Richland County stopped maintaining the

disputed portion of the road while it continued to maintain the 2,900 foot portion of the road that it maintains today.

In summary, both the county maintained portion of the road and the disputed portion of the road were equally public until at least 1969. The statutory requirement for closing a public road became law in 1962 while both portions were under equal public maintenance and equal public use. The Dunn's Mountain Hunt Club, and later the Defendant's predecessor in title, began erecting gates across the road in 1970, but neither they nor Richland County complied with the statutory requirements for closing a public road. Therefore, the disputed portion of the road is still a public road because the legal requirement to close it to the public has never been met.

20. The compelling irony in this case is that the Defendant would be wholly without access to her property if the public easement to the first 2,900 feet of Northeast Shady Grove Road had not arisen at law from the very public maintenance and public use of the road described by the Plaintiff's witnesses. The Defendant readily accepts the benefit of the public easement providing access to her property, but seeks to deny that same benefit to the two landowners, the Plaintiff and Guy, whose lands are further down the road. If the public use and public maintenance were not as the Plaintiff's witnesses Campbell, Kirkland, Higgins and Lafaye testified that they were, the Defendant herself would be landlocked.

21. I find by strict, cogent and convincing evidence as set forth above that the continuous widespread public usage of the disputed portion of Northeast Shady Grove Road from 1945 through 1963, without challenge or interference from the previous owners of the Defendant's tract, establishes the public character of the road. This conclusion is fortified by the extent and

duration of the public maintenance performed on the disputed portion of Northeast Shady Grove Road from 1945 until 1969 which was equal in all respects to the public maintenance on the 2,900 foot section of the road that is currently maintained by Richland County as a prescriptive easement.

22. I find by strict, cogent and convincing evidence that Northeast Shady Grove Road was a public road from U. S. Highway 601 to the plaintiff's property line where, according to testimony of the Plaintiff's witnesses, the county motor grader turned around at until the first gate was erected in 1970.

23. I find by strict, cogent and convincing evidence that the §57-9-10 South Carolina Code of Laws Ann. requiring a judicial proceeding to abandon or close a public road was in effect in 1970 when the first gate was put up on Northeast Shady Grove Road.

24. I find by strict, cogent and convincing evidence that the judicial proceeding required under §57-9-10 South Carolina Code of Laws Annotated to close the disputed portion of Northeast Shady Grove Road and to cut off the Plaintiff's legal right to use the disputed portion of the road has never been filed.

25. That the Defendant's property includes a tract containing 213.53 acres as shown on a plat prepared by Bostick Surveying for Nancy D. Martin dated February 15, 2010, Plaintiff's Exhibit 22, and an adjacent tract, sometimes referred to as the Lewis Tract, containing 64.68 acres as shown on a plat prepared by Bostick Surveying for Nancy D. Martin, et al. dated September 9, 2012, Plaintiff's Exhibit 23. Both plats show the disputed portion of the road in question and label it Black Dog Road.

26. That the 213.53 acre tract shown on Plaintiff's Exhibit 22 was conveyed to the Defendant on August 9, 2007, by the trustees of the Edward Frank Martin, Jr. Trust, Plaintiff's Exhibit 24.

27. That the 213.53 acre tract shown on Plaintiff's Exhibit 22 was passed down to the Defendant's father, Edward Frank Martin, Jr. through his mother and sisters from his father, Edward Frank Martin, Sr. who died owning it on December 15, 1967.

28. That Edward Frank Martin, Sr. obtained this tract from Florence Martin Van Horten by deed dated December 29, 1939, Plaintiff's Exhibit 27, which deed imposes a twenty (20) foot permanent right of way on the property "from said road running through the plantation back to the lands of J. H. and Ella T. Miller."

29. That the easement in favor of J. H. and Ella T. Miller derives from a deed by J. H. Miller to Ossee M. Martin dated November 18, 1918 reserving the identical easement over the lands now owned by the Defendant, Plaintiff's Exhibit 29.

30. That the lands of J. H. and Ella T. Miller, referred to in Plaintiff's Exhibit 27 as the tracts served by the twenty (20) foot right of way, are now a portion of the Plaintiff's tract south of Raglin Creek.

31. That the only road fitting the description in Plaintiff's Exhibit 27 running through the Defendant's property to the Plaintiff's property, which is shown on the 1939 South Carolina Highway Department Map, Plaintiff's Exhibit 49, and the 1943 aerial photograph, Plaintiff's Exhibit 46, is the disputed portion of Northeast Shady Grove Road.

32. That as to the 64.68 acre tract owned by the Defendant shown on Plaintiff's Exhibit 23, it is shown as 65.61 acres on a plat prepared for the Estate of F. R. Martin by Keels Engineering Company dated May 25, 1970, Plaintiff's Exhibit 35.

33. That according to the August 15, 1971 deed from Sara Martin Goff et al. to Joe Earl Taylor et al., Plaintiff's Exhibit 33, this tract of the Defendant is identical to the tract conveyed to Fletcher R. Martin by the heirs of Mattie L. C. Desportes by deed dated September 24, 1948, Plaintiff's Exhibit 36, which deed describes and conveys Tract E from the 1884 plat of the property partitioned in the 1885 lawsuit of Mattie L. C. Desportes v. John A. Myers et al., the 1884 plat being Plaintiff's Exhibit 19.

34. That on December 21, 1926, Mattie L. C. Desportes was the owner of Tract E (now the Defendant's 64.68 acre tract acquired from Lewis in 2012) when the said Mattie L. C. Desportes signed a deed to the Plaintiff's predecessor in title, Lura Mae Kinsland, Plaintiff's Exhibit 16, conveying to Kinsland Tract 1 from the 1884 partition suit, Plaintiff's Exhibit 19, when she imposed upon Tract E:

"also convenient rights of way for cart and wagon road over the lands of the parties of the first part and each of them to the Burney lands, the Martin lands, and the English lands for the purposes of ingress and egress and access from the public road to such tracts of land. Said grantee, her heirs and assigns shall also have the right to construct and use cart and wagon roads connecting the said tracts of land hereby conveyed with each other by the nearest convenient route, the present roads upon said lands to be followed where (illegible) and no lands at present under cultivation to be taken for roads without compensation being made for the same. **The said rights of way to be appurtenant to and pass by conveyance of the tracts of land above described.** The said right of way not to exceed twenty feet in width (illegible)." (Emphasis added)

35. That the tracts conveyed to Kinsland by Mattie L. C. Desportes, J. H. Miller and Ella T. Miller, formerly Ella Black, were Tract 1, Tract 2 and Tract 4 from the 1884 partition plat, Plaintiff's Exhibit 19, which now form the southeastern corner of the Plaintiff's tract, and the easement conveyed in Plaintiff's Exhibit 16 was for the purpose of giving those tracts now owned by the Plaintiff access to the public road.

36. That on December 21, 1926 when they signed the deed to Lura Mae Kinsland, Plaintiff's Exhibit 16, conveying Tracts 2 and 4 from the 1884 partition plat together with the rights of way to reach those lands which are now a part of the Plaintiff's tract, J. H. Miller and Ella T. Miller owned and through Plaintiff's Exhibit 16 conveyed to Kinsland, her heirs and assigns the right of way over the Defendant's tract described in the November 18, 1918 deed to Ossee M. Martin, Plaintiff's Exhibit 29, and later described on the deed to the Defendant's grandfather, Plaintiff's Exhibit 27.

37. I find by a preponderance of the evidence that the Plaintiff's Exhibit 16 conveyed the twenty (20) foot easement on the Defendant's 213 acre tract shown on the 2010 Bostick Plat, Plaintiff's Exhibit 22, and the easement over the Defendant's 64.68 acre tract shown on the 2012 Bostick Plat, Plaintiff's Exhibit 23, to Lura Mae Kinsland, the Plaintiff's predecessor in title, and expressly made both easements into appurtenances to pass by conveyance of Tracts 1, 2, and 4 from the 1884 partition plat which are now part of the Plaintiff's tract.

38. I find that both easements imposed on both of the Defendant's tracts flowed to the Plaintiff by and through the language "Together with all and singular, the rights, members, hereditaments, appurtenances to the said premises belonging or in anywise incident appertaining," which language is found in each deed in the Plaintiff's chain of title and which language was meant to convey the said easements, which were appurtenances to the Plaintiff's tract.

39. That at the time of the research of Shady Grove Road performed by Michael Mills in 2014, both easement deeds cited above were greater than sixty years old and therefore outside of the scope of a sixty year title search, which is the standard of practice for title searches in South

Carolina, although many real estate attorneys now use a forty year standard. This explains why Michael Mills testified that he did not discover an easement to Shady Grove Road.

40. I find by clear and convincing evidence that the Plaintiff and its predecessors in title used the disputed portion of the road in question for a period exceeding twenty (20) years.

41. I find by clear and convincing evidence that the use by the Plaintiff and its predecessors in title was continuous and uninterrupted for the full twenty (20) year period.

42. I find by clear and convincing evidence that the use by the Plaintiff and its predecessors in title was adverse to the rights of the Defendant.

43. I find by clear and convincing evidence that efforts by the Defendant and her predecessors in title to stop the adverse use of the road in question by erecting and locking a gate on the road failed. The Plaintiff produced numerous witnesses who testified that they used the road openly and notoriously in spite of the Defendant's efforts, and the Defendant's witnesses testified that adverse users were cutting the chain on the gate and installing their own locks.

44. I find by clear and convincing evidence that the Plaintiff's use of the road in question was under a claim of right, that the members of the limited liability company believed they had a right to use the road in question because it appeared prominently on the 2004 Gonzales Plat, Plaintiff's Exhibit 2, and because its predecessors in title maintained a lock on the gate and used the road whenever they needed to do so.

45. I find no evidence that the Defendant or her predecessors in title ever gave the Plaintiff or any of those using the road in question under the plaintiff or his predecessors in title permission to use the road. The only people who received permission to use the road from the Defendant or her father were her surveyor, her foresters, the members of Dunn's Mountain Hunt Club and

Santee Cooper; and in the end she withdrew her permission from the hunt club and Santee Cooper.

46. I find by clear and convincing evidence that the Plaintiff and its predecessors in title back to 1976 were business entities and a trust which could only use the disputed road in and through their employees, agents, foresters, timber crews, surveyors, real estate agents, and invited guest, who hunted and fished on the Plaintiff's tract together with members of hunt clubs who leased the hunting rights to the Plaintiff's tract and that these persons used the road in question with a frequency commensurate with the use of the property for hunting, fishing and, growing and harvesting timber. From 1976 to the present, no individual person has owned the Plaintiff's tract.

47. I find by clear and convincing evidence that the Plaintiff has proved the identity of the thing enjoyed, the road in question, from 1939 when it appeared on the South Carolina Department of Highways Map through the 2004 Gonzales Plat.

48. I find by clear and convincing evidence that the Plaintiff has proven the elements of an easement by prescription.

49. I find that the Defendant has failed to prove by clear and convincing evidence that she has adversely possessed the road for a ten (10) year period. The Plaintiff produced witnesses who testified to using the road adversely to the Defendant's interests within a ten (10) year period prior to the filing of the lawsuit.

CONCLUSIONS OF LAW

THE PRESCRIPTIVE EASEMENT

The prescriptive easement derives from the presumption of a lost grant. “It is enough if the use of the way cannot be reconciled with the right of the owner of the land otherwise than by supposing a license or grant, and in that case, if sufficient time has elapsed, the law presumes a grant.” Craven v. Rose 3 S.C. 72 (1871). The law presumes from the use of the way by the claimant, that he must have a grant of an easement that has been lost.

In order to establish an easement by prescription, a party must show: (1) The continued and uninterrupted use or enjoyment of a right for a full period of Twenty (20) years; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse or under a claim of right. Horry County v. Laychur, 315 S.C.364, 434 S.E.2d 259 (1993). Once a right of way by prescription has been established by 20 years of continuous use, a later diminishment in the frequency of that use does not necessarily nullify the established right by prescription. Culthbert v. Lawton 3 McCord 194 14 S.C.L.194 (Ct. App. 1825). “Furthermore, in order to satisfy the continual use requirement, the use must only be of a reasonable frequency as determined from the nature and needs of the claimant.” Jones v. Daley 363 S.C.310, 609 S.E.2d 597 (2005). “The element of continued use does not require the use thereof every day for statutory period, or even on a weekly or monthly basis; but simply the exercise of the right more or less frequently according to the nature of the use and the needs of the claimant.” Jones v. Daley supra. The needs of the claimant in this case include only hunting sporadically, taking timber occasionally, showing the property for sale and surveying the property.

The standard of proof for establishing an easement by prescription is proof by clear and convincing evidence. Bundy v. Shirley 412 S.C. 292, 772 SE 2d 163 (2015). As to the twenty year use element, the Plaintiff produced testimony that members of the Plaintiff LLC, James Podell, and Claude Campbell used the disputed road to access their property before and after they acquired title to it on March 11, 2009. It produced testimony that Cecil Brazell had used the disputed road to hunt the property as an invited guest during the ownership period of Pine Ridge Investments LLC and that Harold Pickrel used the disputed road to show the property under the ownership period of Pine Ridge Investments LLC. It produced testimony that Angus Lafaye and Gordon Baker had used the disputed road to provide forestry services to both the Whitfield Company and Prospect Hill of Edisto Island during their ownership periods from 1999 to 2005. Also, Billy Cate used the disputed road to show the property during the Whitfield Company and Prospect Hill ownership periods. Mike Mills testified that he used the disputed road to survey the Plaintiff's tract in 2004. Also, Gordon Baker testified that timber harvests were conducted on the Plaintiff's tract during the Whitfield company period of ownership and the Prospect Hill period, and that the log trucks used the disputed road to hall the timber out. The Defendant's witnesses testified that the log trucks caused damage to the disputed road when the timber was cut on the tract now owned by the Plaintiff. Tim Dargan testified that he used the disputed road to provide forestry services to Robert J. Sheheen as Trustee of the Lloyd Trust. Mr. Dargan produced and distributed Plaintiff's Exhibit 38, which is an advertisement inviting potential buyers to use the disputed road to access the property and giving out the combination of the lock on the gate. Jamie Guy II testified that he used the disputed road to hunt the property now owned by the Plaintiff under a hunting lease that was in effect during the Lloyd and Lloyd Trust

ownership period from 1974 until 1999. Angus Lafaye testified that he used the disputed road to provide forestry services to the then owner of the land now owned by the Plaintiff from 1968 until 1969. Jamie Guy II testified that he has used the disputed road to access the property now owned by the Plaintiff and his property behind it continuously from the early 1950s until the filing of this lawsuit. Algie Campbell, W. D. Kirkland and Benny Higgins testified as to their use of the disputed road during the 1940s, 1950s, and 1960s. Claude Campbell testified that he had first used the disputed road to visit his uncle Fletcher Martin in 1939. In addition to the use witnesses as produced by the Plaintiff, the testimony of the defense witnesses, including the Defendant herself, that unauthorized locks had to be removed from the chain on the Defendant's gate from 1982 until 2009 proves adverse use by the owners of the unauthorized locks over a twenty year period.

A party may "tack" the period of use of prior owners in order to satisfy the twenty year requirement. Morrow v. Dyches 328 S. C. 522, 492 S. E. 2nd 420 (1997). I conclude as a matter of law that the owner can make use of the road through his agents, foresters, surveyors, realtors, timber crews, and hunters who hunted by invitation of the owner or as members of a hunting club that has leased the hunting rights to the property. In this case the property now owned by the Plaintiff has been owned by a trustee and various business entities since December 30, 1976, which entities must act through their agents, contractors, and lessees, and so forth.

I conclude as a matter of law that the Plaintiff has met his burden of proof as to use of the disputed road for a twenty year period.

I conclude as a matter of law that the Plaintiff has met his burden of proof as to the identity of the thing enjoyed by introducing the various plats, aerial photographs, and maps cited above in the paragraphs 13 and 14 of the Findings of Fact.

I conclude as a matter of law that the use of the disputed road by those using the road under the Plaintiff and its predecessors in title was adverse. "When the claimant has established that the use was open, notorious, continuous and uninterrupted, the use will be presumed to have been adverse." Kelley v. Synder 396 S. C. 564, 722 S. R. 2d 813 (2012). The Plaintiff's witnesses who testified as to the use of the disputed road generally used it to hunt, survey the Plaintiff's property, cruise timber, and cut timber, all of which are daytime activities. Many of them testified that their use was open and notorious. Most of them used motor vehicles. It is difficult to imagine a use of a dirt road more adverse than sending fully loaded log trucks down it as witness Gordon Baker described. Witness Tim Dargan put the combination of his lock on the gate in a sales flier and distributed it to potential purchasers. The lock cleaning testimony of the Defendant's hunt club witnesses showed that unauthorized users cut the chain on the Defendant's gate and installed unauthorized locks on the chain continually during the 1970s, 1980s, 1990s, and 2000s, so that periodic lock cleanings were necessary to remove the unauthorized locks. After each lock cleaning, the accumulation of unauthorized locks would start again, indicating that the adverse users simply ignored the efforts by the Defendant to restrict their use. The act of cutting the Defendant's chain and installing a lock not authorized by her is an act in defiance of the Defendant's right to control the road or her property, the quintessential adverse use, and according to the Defendant's witnesses, it went on all the time during the twenty year period prior to the filing of this lawsuit.

The Defendant asserts that the Plaintiff and its predecessors in title used the disputed road by permission granted by the Defendant and her predecessors in title, and that the use was permissive and not adverse. There is no evidence in the record that the Plaintiff or any of its witnesses ever received permission from the Defendant or her predecessors in title except witness Bennie Higgins and witness Jamie Guy II. Witness Bennie Higgins, who used the disputed road as a member of the public and was otherwise not associated with any owner of the Plaintiff's tract, testified that he obtained a key to a gate on the road from Wessinger (Transcript p. 180, line 20) in the 1970s. Gary Wessinger denies giving Higgins a key (Transcript p. 390, line 1). But if this key was given to Bennie Higgins it was while the gate across the disputed road was on the property of one Higgins, also leased by the hunt club before the gate was moved to the Defendant's property in 1982 according to Defendant's witness Gary Wessinger. Even if witness Higgins got a key to the gate he was not an owner of the Plaintiff's tract at the time, and the gate was not located on the Defendant's tract at that time. As to witness Jamie Guy II, the Defendant's witnesses associated with the Dunn's Mountain Hunt Club testified that Mr. Guy's lock was not removed from the Defendant's gate during the various lock cleanings because Mr. Guy had an arrangement with the Defendant's father to use the disputed road. Mr. Guy came back to testify in reply that no such arrangement existed, and that he never sought or received permission from the Defendant or her father to use the disputed road.

The Defendant cites the case of Bundy v. Shirley supra as authority for the proposition that the gates erected by the hunt club prove permissive use of the road. In that case Shirley, who was seeking to prove a prescriptive easement over the lands of Bundy, built a gate across the road on Bundy's property with Bundy's permission. The Supreme Court held that by going

to Bundy and obtaining permission to build the gate, Shirley acknowledged Bundy's right to control the use of the road, and the act of obtaining permission to build the gate rendered Shirley's use of the road permissive rather than adverse. Also in Bundy v. Shirley, Bundy's property had been leased to the State of South Carolina as game management lands under a program where the public was allowed to enter onto private property leased to the state to hunt and carry on other recreational activities during the twenty year use period. The Supreme Court expressed doubt as to whether Shirley's use of the road while the lands were open to the public constituted adverse use. Finally, during the game management lease, the South Carolina Department of Natural Resources erected a cable gate across the road. Shirley sought and obtained a key from the SCDNR game warden which he used to unlock the SCDNR gate and use the road. Obtaining the key from the game warden, the lessee of the owner Bowater was evidence of permissive use.

In this case, the Plaintiff had nothing to do with the construction or maintenance of the gates across the disputed roadway. The Defendant's property has never been leased to the state for use by the public. The Plaintiff has never obtained a key from the Defendant or any lessee of the Defendant. After the Defendant removed the Plaintiff's lock from her gate in 2009, the Plaintiff made several attempts to contact the Defendant to discuss the matter. When these efforts proved unsuccessful it ultimately filed this lawsuit. None of the facts that led the Supreme Court to conclude that Shirley's use of the road was permissive in Bundy V. Shirley supra are present in this case. Under Williamson v. Abbott 107 S.C. 397, 93 S. E. 15 (1917). "The asking and obtaining of permission" is necessary to stamp the character of the use as not having been adverse. In this case the Defendant and her predecessors in title erected a gate

across the disputed road, by all accounts refused to give the Plaintiff or the Plaintiff's predecessors in title permission to use the disputed road, and the Plaintiff and its predecessors in title continued to use the road whenever they needed to do so in spite of the gate. In order to support a finding of permissive use, the Defendant, a tenant of the Defendant, or someone claiming authority under the Defendant would first have to give permission to the Plaintiff or someone claiming under it to use the road or at least provide a key, which never happened in this case. Finally, the case of Craven v. Ross 3 S.C. 72 (1871) held that, "The way had been used for the required period over land enclosed and occupied by the defendant and during a portion of that time the plaintiff had, in order to use it, opened a gate placed by the defendant at the entrance of the land. It therefore followed that if the use was of the character stated in the evidence, it was necessarily adverse." In other words, continued use by the Plaintiff after the Defendant erects a gate on the road has been held to be evidence of adverse use.

A party claiming a prescriptive easement under a claim of right must demonstrate a substantial belief that he had the right to use the road based upon the totality of the circumstances. Hartley v. John Wesley United Methodist Church 355 S.C. 145, 584 S. E. 2d 386 (Ct. App. 2003). The law granting a prescriptive easement under claim of right does not mandate a party to believe that he holds actual title or that he plans to acquire it. Hartley v. John Wesley United Methodist Church, supra. James Podell testified that he believed that he had the right to use the disputed road because it was shown on the 2004 Mills plat, Plaintiff's Exhibit 2, that was used in drafting the deed to the Plaintiff and referred to it in the property description, based on statements made by his closing attorney in reference to the right to use the road at his closing, and based on the fact that he was able to use the disputed road to access his property

throughout the process of purchasing the Plaintiff's tract. Likewise, other witnesses produced by the Plaintiff who used the road under prior owners testified that they believed that they had the right to use the road because it had been used for a considerable time to access the Plaintiff's tract and because it had received public maintenance services in the past. I conclude as a matter of law that the Plaintiff has proved by clear and convincing evidence that the Plaintiff and its predecessors in title used the disputed road under a claim of right. I conclude as a matter of law that the Plaintiff has proved that it has a private prescriptive easement to use the disputed road across the lands of the Defendant to access the lands of the Plaintiff.

EASEMENT BY GRANT

The standard of proof applicable to establishing an easement by grant, has not been elevated to a higher standard of proof than the preponderance of the evidence standard applied generally in civil actions in South Carolina.

As a result of an 1885 partition suit, J. H. Miller became the owner of Tract D shown on the 1885 partition plat, Plaintiff's Exhibit 19, which became the greatest part of the Defendant's primary 213 acre tract, and the same J. H. Miller owned Tract 2 on Plaintiff's Exhibit 9, which became a portion of the Plaintiff's tract below Raglin Creek. Ella T. Miller, the wife of J. H. Miller, got Tract F and Tract 4 in the same partition suit, which later became a portion of the Plaintiff's tract. Mattie L. C. Desportes got Tract E, which became the Defendant's 64.68 acre tract, and Tract 1, which became the southeastern most portion of the Plaintiffs tract, all as shown on the 1884 plat, Plaintiff's Exhibit 19.

In 1918 J. H. Miller sold Tract D to one Ossee Martin, Plaintiff's Exhibit 29, but because he still owned Tract 2 and his wife, Ella, still owned Tracts F and 4, J. H. Miller was careful to

reserve for himself and his wife a twenty (20) foot easement through Tract D to provide access to Tract F, Tract 2 and Tract 4 that later became part of the Plaintiff's tract below Raglin Creek.

On December 21, 1926, J. H. Miller conveyed Tract 2, Ella T. Miller conveyed Tract 4, and Mattie L. C. Desportes conveyed Tract 1 from the 1884 partition plat to the Plaintiff's predecessor in title, Lura Mae Kinsland. In order to provide access to Tracts 1, 2, and 4, all of which are part of the Plaintiff's tract, the 1926 deed to Lura Mae Kinsland grants a right of way over the cart and wagon roads owned and controlled by the grantors, J. H. Miller, Ella T. Miller, and Mattie L. C. Desportes leading to and providing access to these tracts. At the time of the 1926 conveyance, Mattie L. C. Desportes still owned Tract E from the 1884 partition that later became the Defendant's 64.68 acre tract. J. H. Miller and Ella T. Miller owned in 1926 the twenty (20) foot right of way over Tract D, which is now the greater portion of 213 acre tract that had been reserved to them in the 1918 deed to Ossee Martin in order to provide access to the same Tracts 2 and 4 that they conveyed to Lura Mae Kinsland. In Plaintiff's Exhibit 16, the twenty (20) foot wide easement retained by J. H. Miller in his 1918 deed of Tract D to Ossee Martin, plus a right of way over Tract E, now the 64.68 acre Lewis tract owned by the Defendant, were granted with the stipulation that existing roads be used where possible. Plaintiff's Exhibit 16 conveys a twenty foot easement across both of the Defendant's tracts serving property that was to become the southeastern corner of the Plaintiff's tract, south of Raglin Creek in Richland County.

Also the 1926 Kinsland deed specifically provides that the rights of way conveyed by that deed were to become appurtenances to Tracts 1, 2, and 4' and pass by conveyance of said lands. Every deed from Lura Mae Kinsland to the Plaintiff in the chain of title conveying a portion of

Tracts 1, 2, and 4, included the language, "Together with all and singular, the rights, members, hereditaments and appurtenances to said premises belonging or in any wise incident or appertaining." This language comes directly from §27-7-10 *South Carolina Code of Laws Ann.*, which sets forth the statutory deed form drafted by the General Assembly. It is not meaningless or flowery language to impress the reader. It means that the conveyance of lands also includes appurtenances such as easements and rights of way that are necessary for the use and enjoyment of the land. In this case, the deeds in the Plaintiff's chain of title after the Lura Mae Kinsland deed, Plaintiff's Exhibit 16, conveyed the appurtenances from grantor to grantee, which included the easements and rights of way over the two tracts owned by the Defendant, which were necessary to provide access to these tracts. Therefore, I conclude as a matter of law that the Plaintiff has proved by a preponderance of the evidence that it has a twenty (20) foot wide easement by grant over the lands of the Defendant following the course of the only west to east road through the lands of the defendant to the lands of the Plaintiff, which is the disputed road. This is a private easement appurtenant in favor of the Plaintiff.

PUBLIC EASEMENT BY DEDICATION

Dedication requires two elements. First, the owner must express in a positive and unmistakable manner the intention to dedicate his property to public use. Horry County v. Laychur 315 S.C. 364, 434 S. E 2d 259 (1993). Second, there must be within a reasonable time, an express or implied public acceptance of the property offered for dedication. Helsel v. City of North Myrtle Beach 307 S. C. 24, 413 S. E. 2d 821 (1992). Even though a land owner must positively and unmistakably express his or her intention to dedicate property, the intent to dedicate may be implied from allowing lengthy public use of the land. Cleland v. Westvaco

Corp. 314 S. C. 508, 431 S. E. 2d 264 (Ct. App. 1993). No formal acceptance of the land by a public authority is necessary to complete the dedication; acceptance may be implied by the public's continuous use of the property. Boyd v. Hyatt 294 S. C. 360, 364 S. E. 2d 478 (Ct. App. 1988). Acceptance of offer of dedication also may be recognized through a public authority's using, repairing or working the streets. Helsel v. City of North Myrtle Beach supra.

The public easement by dedication where the dedication is proved by the owner's acquiescence in public use and maintenance of the road, and the acceptance of the dedication is proved by public maintenance of the road, is similar to a prescriptive easement in favor of the public but the elements are not identical.

In a public dedication case, the twenty (20) year use period for use by the public does not apply. "Where there has been an intended dedication by the owner of the property, no specific duration of use is required to show acceptance. The sufficiency of the use depends on the circumstances of each case." Boyd v. Hyatt supra. (finding public use for 13 years sufficient evidence of acceptance by the public)

The standard of proof for a public dedication of a right of way is strict, cogent and convincing evidence. Mack v. Edens 320 S. C. 236, 464 S. E. 2d 124 (1995).

As to the manifest intent of the Defendant's and her predecessors in title to dedicate the disputed road for public use, the Plaintiff produced testimony that the disputed road was open to the public and used by members of the public having no association with the Plaintiff's property or the Defendant's property from 1944 until 1963 or 1964. Witnesses Campbell, Kirkland, and Higgins testified that the disputed road was well maintained by county road scrapers during this time period. "The roads were like a super highway back then," according to W. D. Kirkland

(Transcript p. 186). Witness Angus Lafaye testified that the county did maintenance on the disputed road when he did forestry work on the Plaintiff's tract in 1968 and 1969 when it was owned by Richard Lloyd. So the Plaintiff has satisfied the public dedication requirement by presenting the uncontroverted testimony of members of the public who used the disputed road for a lengthy period of time. The Plaintiff has satisfied the public acceptance of the dedication requirement by presenting testimony that the disputed road received regular public maintenance from 1944 until at least 1969. The Plaintiff also introduced the 1939 South Carolina Highway Department Map showing the disputed road as a public road.

The disputed portion of Northeast Shady Grove Road and the portion now maintained by Richland County appear to have been equally public rights of way from 1939 until 1969 in terms of public use and public maintenance. The General Assembly passed a statute requiring a legal action to be filed in order to abandon or close a public road in 1962 while the disputed road was still under county maintenance according to the testimony of the Plaintiff's witnesses. The Defendant's predecessors in title began erecting gates on the road in 1970, but they never filed the legal action required by §57-9-10 *South Carolina Code of Laws Ann.* Having failed to comply with the requirements of notice and due process mandated by the State in order to abandon a public road, the Defendant and her predecessors in title have failed to legally extinguish the public character of the road that it enjoyed in 1962 when §57-9-10 was enacted. Therefore I conclude as a matter of law that the disputed portion of Northeast Shady Grove Road from the end of county maintenance sign to the Plaintiff's property line is a public road until the Defendant or Richland County complies with the applicable statute to close it.

STATUTE OF LIMITATIONS

The statute of limitations applicable to prescriptive easement actions is ten (10) years from the time the easement is obstructed. §15-3-340 *South Carolina Code of Laws Ann.* Bowen v. Team 6 Rich. 298, 40 S. C. L. 298 (1853). The ten (10) year statute under current §15-3-340 *South Carolina Code of Laws Ann.* is the only statute of limitations that has ever been used in a prescriptive easement case. §15-3-360 *South Carolina Code of Laws Ann.* has never been applied in a prescriptive easement case, and it cannot be applied to a claim for prescriptive easement because the Claimant in a prescriptive easement case is forced to rely on multiple entries on the servient estate which must occur at least twenty (20) years prior to the filing of the lawsuit. If he files the action within one (1) year of each entry upon which he relies he will never have twenty (20) years of continuous use when filing the suit.

ADVERSE POSSESSION OF THE EASEMENT BY DEFENDANT

The Defendant has not adversely possessed the easement over Shady Grove Road, because she has not obstructed the adverse use of the road for the full ten (10) year period required under the Statute of Limitations §15-3-340 *South Carolina Code of Laws Ann.* and the common law. Bowen v. Team supra. The Plaintiff produced testimony of witnesses James Podell, Claude Campbell, Lafaye, Baker, Cate, Pickrel, Cecil Brazell, Mac Brazell, Mills and Guy to prove use of the disputed road within ten (10) years of the filing of suit. Adverse possession is the same legal issue as the running of the Statute of Limitations since the cause of action for adverse possession is based on the running of the ten (10) year Statute of Limitations.

Evidence of adverse use of the road by the Plaintiff and others within ten (10) years of the filing of the action defeats the Defendant's claim of adverse possession.

CONCLUSION

In conclusion the Plaintiff has proved that the disputed road appears on maps, plats and aerial photographs dating back to 1939. It has received public maintenance in the past and use by the public. Those performing work, hunting and fishing under the Plaintiff and his predecessors in title have use the road to reach the Richland County side of the Plaintiff's tract South of Raglin Creek in spite of the gates erected by the Defendant and her predecessors in title for a period exceeding twenty years. The efforts by the Defendant to curtail such use by erecting gates, coupled with the stubborn determination of the Plaintiff and its predecessors to continue such use, establishes that the use was adverse. Finally, the deed to the Defendant's grandfather, E. F. Martin, Sr., imposes a twenty (20) foot easement on her property extending from west to east to provide access to the predecessors in title to the southeastern corner of the Plaintiff's tract, placing the Defendant on notice that she owes the Plaintiff access across her property to its lands lying south of Raglin Creek. The prescriptive easement is based on the theory of a lost grant, and in this case, the lost grant has turned up in the 1939 deed to E. F. Martin, Sr. and the 1926 deed to Lura Mae Kinsland. Considering all of these facts together, it is manifest that the Plaintiff is entitled to at least a private easement to use this road that has endured for seventy years, and has been used by the Plaintiff and its predecessors in title as the principal, if not the sole, access to that portion of the Plaintiff's property lying south of Raglin Creek in Richland County, which creek has obstructed access to this portion of the Plaintiff's property from U.S. Highway 601 for most of that seventy year period.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is ordered:

1. That the Plaintiff has a private twenty (20) foot wide easement across the lands of the Defendant to use the disputed portion of Northeast Shady Grove Road from the end of county maintenance sign to the Plaintiff's southern property line as shown on the 2004 Gonzales plat, Plaintiff's Exhibit 2. The Defendant is enjoined from obstructing the Plaintiff's use of the road by a locked gate or any other device. To the extent that the Defendant keeps a gate across said road, the Defendant is ordered to provide the Plaintiff with a means of opening the gate such as a key or combination to any lock on the gate within thirty (30) days of the signing of this order. This easement is appurtenant to the tract now owned by the Plaintiff and shall run with the land to the Plaintiff's successors and assigns; and
2. Northeast Shady Grove Road from the end of county maintenance sign to the Plaintiff's southern property line as shown on the 2004 Gonzales plat, Plaintiff's Exhibit 2, is declared to be a public road open to the public for use by the public, provided that Richland County is not required by this order to provide maintenance services to the portion of Northeast Shady Grove Road past its end of county maintenance sign. The Defendant is ordered to remove her gate from this road within thirty (30) days of the signing of this order.

AND IT IS SO ORDERED.

Joseph M. Strickland
Master in Equity for Richland County

BRUNER, POWELL, WALL & MULLINS, LLC

ROA 001129

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May 13, 2016

Via Email and U.S. Mail

The Honorable Joseph M. Strickland
Richland County Master In Equity
P.O. Box 2766
Columbia, SC 29202

Re: Country Properties, LLC v. Nancy Dunn Martin
C/A No.: 14-CP-40-1805
Our File No.: 8-2376.101

Dear Judge Strickland:

Enclosed herewith you will find a proposed Order in connection with the above-referenced civil action that was tried before you this past March (March 21-24, 2016), along with a certificate of service evidencing service of same on Counsel for the Plaintiff. In the email that I am sending to you transmitting this proposed order, I have attached a word version and a pdf version of the attached order. Under separate cover, I am transmitting a copy of the condensed trial transcript for the Court's file.

With my highest regards, I am,

Sincerely,


Joey R. Floyd

jrf:hos

Enclosure (Proposed Order)

Cc: John Wells, Esquire (Via Email and U.S. Mail w/copy of Enclosures)
Nancy D. Martin (Via Email only w/copy of Enclosures)

ROA 001129

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Country Properties, LLC,

Plaintiff,

vs.

Nancy Dunn Martin,

Defendant.

BEFORE THE MASTER IN EQUITY

Civil Action No.: 14-CP-40-1805

ORDER**I. INTRODUCTION**

This matter was referred to this Court through a Consent Order, signed by the Honorable L. Casey Manning on July 7, 2014. This action was tried before this Court (non-jury) on March 21-24. Both parties were ably represented by counsel. The Plaintiff, Country Properties, LLC (referred to herein as “the LLC” or “Plaintiff”), was represented by John Wells and the Defendant, Nancy Dunn Martin (referred to herein as “Defendant” or “Nancy Martin”), was represented by Joey R. Floyd and Wesley D. Peel. The Court heard and considered testimony from the witnesses presented, along with the evidence presented by the parties.

The LLC contends that it is entitled to use a dirt road behind a locked gate (locked since 1970) that travels across the middle of Nancy Martin’s property as an additional point of access to its 1,023 acre tract of land. The LLC has access to its property off of two public roads (Highway 601 and Old English Road). Northeast Shady Grove Road is a dirt road in Richland County off of Highway 601 with its terminus 2,914 feet from Highway 601. The terminus of Northeast Shady Grove Road is on Nancy Martin’s Property, where Richland County has placed an “End of County Maintenance” sign. The locked gate is located beyond the terminus of Northeast Shady Grove Road on Nancy Martin’s property.

The LLC seeks a judicial determination that it has an easement through Nancy Martin's property. The LLC filed this action on March 18, 2014, alleging five theories that would allow it to use the dirt road (behind the locked gate) across the middle of Nancy Martin's property: (1) easement by express grant, (2) prescriptive easement, (3) a permanent injunction against Nancy Martin from "blocking or obstructing" Shady Grove Road due to easement by grant, (4) a permanent injunction against Nancy Martin from "blocking or obstructing" Shady Grove Road due to prescriptive easement and (5) that the dirt road through Nancy Martin's property (referred to as "Shady Grove Road" by the LLC) is a public road dedicated to public use. Nancy Martin denied that the LLC had an easement of any type to use the dirt road on her property and denied that the road on her property has been dedicated for public use. Nancy Martin also asserted a number of defenses, including the Statute of Limitations, and filed a counterclaim for adverse possession.

During the trial of this matter, the LLC called the following witnesses:

Anna C. Williams (title searcher)
 Cecil Lavon Brazell
 Harold V. Pickrell III
 Algie Campbell, Jr.
 Lever Mack Brazell
 James Lindsay Guy, II
 Ben Heyward Higgins
 William Duncan Kirkland, Jr.
 Alan Mustard Wooten
 Timothy G. Dargan
 Angus Lafaye
 Gordon H. Baker
 William Cate
 Claude Campbell (by video deposition)
 Arnold Ross Taylor
 Michael Mills (Expert Witness – land surveying)
 James Podell

Nancy Martin called the following witnesses at the trial:

Gary Wessinger
Glen Wessinger
Randy Byrd
Nick Anderson
Mark Paul Kays
Nancy Martin

Having heard the testimony and considered the evidence presented at the trial, the credibility of the witnesses, the legal arguments offered by the parties, and based upon the preponderance or greater weight of the evidence, this Court makes the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACTS

The Parties and the Location of the Dispute

1. The LLC owns 1,023.07 acres, partly in Richland County (383.67 acres) and partly in Kershaw County (640.07 acres).
2. Raglins Creek, which runs through the LLC's property, is the border between Richland County and Kershaw County.
3. The LLC purchased the 1,023.07 acre tract in 2009 from Pine Ridge Investments, LLC ("Pine Ridge Investments").
4. Nancy Martin owns approximately 276 acres on the Southern side of the LLC's property, all of which is located in Richland County. The LLC and Nancy Martin share a common boundary line.
5. The dirt road at issue in this case is located in Richland County.
6. Nancy Martin inherited a certain portion of her property (210.5 acres) from her father, Edward Frank Martin, Jr., in 2007 and Nancy Martin purchased a triangular shaped parcel of land (64.68 acres) in 2012 from Laura Jane Lewis Allen, and others.

(Plaintiff's Exhibits 21 and 31)

7. The Defendant's property, i.e. the property owned by Nancy Martin, all of which is located in Richland County will be referred to herein as "the Martin property" or "the Defendant's property."
8. Nancy Martin's grandfather, Edward Frank Martin, died in 1967, leaving the 210.5 acres, approximate, to Jessie Dunn Martin, in a life estate, with the remainder interest being left to Jessie Martin Pratt, Edward Frank Martin, Jr. and Naomi Jackson Pratt.
9. Edward Frank Martin, Jr. owned a remainder interest in the property in 1970 and his mother, Jesse Dunn Martin, was the owner of a Life Estate in the property.
10. Edward Frank Martin, Jr., the Defendant's father, was the caretaker of this property for Jessie Dunn Martin and he had the right to control the property. (Tr. 477, lines 7-12)
11. The Defendant's grandmother, Jessie Dunn Martin, passed away in 1985 and her father, Edward Frank Martin, Jr. took full ownership of the property in 1990.
(Plaintiff's Exhibit 26)
12. Plaintiff's Exhibit 2 is a plat filed with the Richland County Register of Deeds in 2004. The plat, as discussed in more detail herein, provides this Court with a good orientation of the current location of the LLC's property, the Defendant's property and the location of the locked gate, even though the plat was prepared in 2004. The plat was prepared approximately five years before the LLC purchased the 1023 acre tract of land that shares a boundary with the Defendant's property.

Installation and Location of the Gate

13. The Dunn's Mountain Hunting Club ("DMHC") was started in 1970 by Gary

Wessinger and several other persons to hunt the property that is now owned by the Defendant. (Tr. 367-8, lines 14-7)

14. Gary Wessinger testified that a locked gate (referred to herein as “the gate”) was placed across the dirt road in 1970. (Tr. 372, lines 19 – 22)
15. According to Gary Wessinger, the gate was installed by DMHC to prevent people from doing “devilment” and Edward Frank Martin Jr. was concerned that somebody was going to start a fire on his property. (Tr. 372-3, lines 24-8)
16. James L. Guy II testified that he was sure the gate was there by 1970. (Tr. 166, lines 2-20 and Tr. 492, lines 20-22) Mr. Guy owns property in close proximity to the dirt road at issue in this case.
17. Nancy Martin also testified that the gate was installed in 1970 because she recalled riding a motorcycle on the property when she was 10 years old (1970). (Tr. 456, lines 13-22 and Tr. 462, lines 2-5)
18. Mr. Wessinger believed that the gate was moved in 1982 or 1983 to its current location. (Tr. 372, lines 19-20) Notwithstanding that fact, a locked gate has been across the dirt road since 1970.
19. DMHC leased the property now owned by Nancy Martin from 1970 – 2013. (Tr. 474-5, lines 20-18)
20. As part of its lease, DMHC maintained all of the dirt roads on the Martin Property. The maintenance included scraping the roads with a motor grader, repairing holes, and removing trees from the roads. All of the roads on the Martin Property are dirt roads. (Tr. 373-4, lines 13-3)
21. When Edward Frank Martin, Jr. was in control of the property and when Nancy

- Martin was in control of the property, you had to have permission to use the road beyond the locked gate. (Tr. 376, lines 17)
22. The gate had a chain with multiple locks on the chain. In order to keep a lock on the chain, one would be required to obtain the permission of Edward Frank Martin, Jr. (Tr. 380, lines 3-5)
23. If someone asked DMHC to use the dirt road beyond the locked gate, DMHC would give the requestor Edward Frank Martin, Jr.'s phone number. (Tr. 376, lines 18-21)
24. DMHC did not hand out keys. (Tr. 376, lines 22-23)
25. DMHC would report unauthorized use of the road to Edward Frank Martin, Jr. (Tr. 378, lines 19-24)
26. This sort of gate, with multiple locks, is typical. (Tr. 224, lines 16-24)
27. Gary Wessinger recalled that Edward Frank Martin, Jr. authorized the following persons to use the road: DMHC, a fellow by the name of Guy, and his son (James Lindsay Guy II), Rufus Lewis, Mr. Higgins and one other gentleman whose name he could not recall. (Tr. 375-6, lines 24-6; Tr. 390, lines 6-8 and Tr. 403, lines 1-7)
28. Gary Wessinger also testified that Mr. Martin allowed loggers who logged the 1000 acre tract to use the dirt road from time to time – Mr. Martin gave the loggers permission to use the dirt road. (Tr. 377, lines 3-13 and Tr. 378, lines 10-24)
29. Over the years between 1970 and 2007 (during Edward Frank Martin, Jr.'s tenure as the owner and/or manager of the property), DMHC and Edward Frank Martin, Jr. would do periodic "lock cleanings" to get rid of the unauthorized locks on the chain. (Tr. 381-3, lines 17-10)
30. In conjunction with the lock cleanings, DMHC would post a sign, similar to

Defendant's Exhibit 12, which states:

IN 15 DAYS, FROM THE ABOVE-DATE, ALL LOCKS THAT ARE NOT AUTHORIZED BY LAND OWNER E.F. MARTIN, JR., WILL BE REMOVED FROM THIS GATE. LOCKS WILL BE FASTENED BY WIRE TO GATE SO THAT YOU CAN RECLAIM YOUR LOCK.

THIS LAND IS LEASED TO DUNN MOUNTAIN HUNT CLUB AND THE ROAD IS MAINTAINED BY THEM.

ANY QUESTIONS CAN BE DIRECTED TO E.F. MARTIN, JR.

AT: OFFICE # 803 779-4937.

31. Mr. Wessinger recalled doing a lock cleaning about six or eight times over the years
(Tr. 383, lines 7-12)
32. Mr. Wessinger testified that nobody ever responded to the notice (Tr. 392, lines 5-7)
and nobody ever claimed a lock. (Tr. 383-4, lines 23-5)
33. There were also multiple times where DMHC just snipped off a lock or two if the
lock(s) were unauthorized. (Tr. 383, lines 14-16)
34. Glenn Wessinger (son of Gary Wessinger) also testified that he believed DMHC did
the best it could to police the gate by taking off locks that did not belong on the gate.
(Tr. 399-400, lines 23-2)

Testimony from Richland County and Kershaw County Employees

35. Randy Byrd, the Richland County Right of Way Agent, testified that Northeast Shady
Grove Road is a public road for 2914 feet from Highway 601. (Tr. 413, 5-23 and
Tr.427, lines14-17)
36. The gate across the dirt road on the Defendant's property is located beyond the End
of County Maintenance on Northeast Shady Grove Road. (Plaintiff's Exhibit 22)
37. Richland County deems the road beyond the End of County Maintenance, 2914 feet

from Highway 601, as being a private road. (Tr. 415, lines 18-20 and Defendant's Exhibit 9)

38. Mr. Byrd was not familiar with Richland County performing any maintenance on the dirt road behind the locked gate on Nancy Martin's property. (Tr. 415-416, lines 25-9)

39. Defendant's Exhibit 9, a map prepared by Richland County, clearly illustrates the public portion of Northeast Shady Grove Road and the private portion of the dirt road that extends beyond the terminus of the public road.

40. Mr. Byrd also testified that the public portion, i.e. to the end of county maintenance sign, of Northeast Shady Grove Road is public by way of a prescriptive easement. (Tr. 417-18, lines 12-2)

41. Nancy Martin also called Nick Anderson, Director of Public Works Department and Solid Waste for Kershaw County, as a witness. Mr. Anderson testified that Kershaw County had not performed any maintenance on dirt roads in Richland County. (Tr. 441, lines 19-22)

Current Ownership of the Plaintiff's Property

42. Jim Podell and Claude Campbell were the members of Country Properties at the time of the purchase. Sometime after the sale, Campbell sold his interest in Country Properties to Jim Podell's wife, Dorothy Podell. Claude Campbell died prior to the trial of this matter and Mr. Campbell's testimony was entered at the trial of this matter through the replay of a video deposition.

43. The LLC has multiple points of access to its property, all of which can be used to access all parts of the LLC's property. (Tr. 336-8, lines 24-10)

Testimony of the Plaintiff's Title Searcher, Anna Williams

44. The first witness called by the LLC was a title searcher, Anna Williams, in an effort to establish the chains of title to the various properties at issue in this case. Ms. Williams testified that she had been a title searcher for thirty years.
45. The LLC contends that the basis giving rise to a purported easement has its origins in an 1884 partition suit.
46. The 1884 partition suit and accompanying plat does not show a road, of any sort, across any tracts of land. (Plaintiff's Exhibits 18 and 19)
47. The 1884 plat does show various tracts of land identified by letters and numbers.
48. The title searcher testified that the Defendant's property is comprised of Tracts D, E and a portion of C on the 1884 plat (Plaintiff's Exhibit 19). (Tr. 76, lines 16-23)
49. Based on the 1884 plat, Tracts C, D and E total 370.4 acres. There was no clarification or explanation, or attempted overlay, of where the Defendant's property is actually located on the 1884 plat. (Plaintiff's Exhibit 19) This leads to a discrepancy of approximately 100 acres.
50. In fact, the title searcher had no explanation for how, or why, large tracts of land essentially disappeared over time in various chains of title. The title searcher provided no explanation for 108 acres turning into 65 acres (Tr. 75-76, lines 20-6) and other acreage discrepancies. (Tr. 84, lines 4 – 21)
51. The LLC has primarily asserted its claim to an easement through two deeds (CW 121 and ES 127). Notably, the deeds do not reference any plat or map of any kind nor is there any description of where these purported rights of way may lie in connection with the Defendant's property, if they are even on the Defendant's property.

52. Notably, the title searcher unequivocally testified that there was no right of way reserved in the "Tract D" chain of title from the 1884 plat. (Tr. 77, lines 10-16). The title searcher contends that the Defendant's property is a part of Tract D shown on the 1884 plat. If there is no right of way reserved, there can be no easement.

Testimony of the Plaintiff's Expert Witness (Land Surveyor)

53. The LLC called Michael Mills as an expert witness during its case in chief. Michael Mills is a licensed surveyor with approximately 40 years of experience at the time this case was tried.

54. Michael Mills was qualified as an expert in the field of "surveying land." (Tr. 270, lines 8 – 13)

55. Mr. Mills' involvement with the LLC's land stems back to 2004, when he/his company prepared a plat (a Boundary Survey) for Gonzales Land and Timber, LLC, which is referred to herein as "the Gonzales Plat." Gonzales Land and Timber, LLC was the owner of the property when the Gonzales Plat was prepared. The Gonzales Plat is Plaintiff's Exhibit 2.

56. The Gonzales Plat was filed in the Richland County Registered of Deeds at Book/Page: R 951/1618.

57. The Gonzales Plat was prepared when Edward Frank Martin, Jr. and Laura Jane Lewis Allen, and others, owned the tracts of land currently owned by the Defendant.

58. Mr. Mills unequivocally testified that there was no written or recorded easement over the lands of Edward Frank Martin, Jr. and Laura Jane Lewis Allen's land, the land that is now owned by Nancy Martin in this case. (Tr. 301, lines 10-15 and Tr. 301-2, lines 21-2)

59. Mr. Mills was familiar with Santee Cooper placing locks on landowner's gates. (Tr. 303, lines 17-19)
60. Nancy Martin testified that the gate on her property had a Santee Cooper lock that was placed on the gate with the permission of her father. (Tr. 459, lines 13-22)
61. Mr. Mills acknowledged that he had a Santee Cooper key. (Tr. 303, lines 20-22)
62. Mr. Mills did not note or make mention of any right of way or easement of any kind traversing the property that is now owned by Nancy Martin when he prepared the Gonzales Plat in 2004.
63. To the contrary, Mr. Mills noted the presence of a "GATE" on the Gonzales Plat across the dirt road shown on the property that was, at that time, owned by Edward Frank Martin, Jr. (Plaintiff's Exhibit 2)
64. Mr. Mills also showed a "CABLE GATE" across the dirt road at the location where the "DIRT WOODS ROAD" leaves the property owned by Laura Jane Lewis Allen, and others, and enters the property owned by Gonzales Land and Timber, LLC. (Plaintiff's Exhibit 2)
65. There is no mention of an easement or any designation whatsoever on the Gonzales Plat that anyone has a right to use that portion of the road beyond the "GATE" at the end of "Shady Grove Road" on the Gonzales Plat. (Plaintiff's Exhibit 2)
66. Mr. Mills testified that he showed gates if they may be an impediment to the property. (Tr. 299-300, lines 20-3)
67. Interestingly, Mr. Mills did note an easement on the property that is now owned by the LLC. In particular, on the Gonzales Plat, Mr. Mills noted a Right of Way Easement leading from Old English Road to the land owned by Upper English

Swamp, Inc. (Plaintiff's Exhibit 2) This particular right of way shown on the Gonzales Plat does not touch Nancy Martin's property nor does it affect Nancy Martin's property.

68. Somewhat surprisingly, Mr. Mills testified at trial that he had not checked with the County (Richland County) to see how the County identified the road. (Tr. 306, lines 9 – 19)

69. Mr. Mills acknowledged that the purpose of a locked gate is to control entry. (Tr. 308, lines 11-15)

70. Mr. Mills also acknowledged that the 2013 aerial photo shows that there is access from Highway 601 and Old English Road to all points on LLC's Property. (Tr. 312-13, lines 18-9)

71. When asked by this Court about the easement, Mr. Mills said: "We didn't find any recorded easement involving the entirety of the road." (Tr., P 315, lines 5-22)

Testimony by Arnold Ross Taylor

72. The LLC called Arnold Ross Taylor, an employee of the University of South Carolina, who works in the Thomas Cooper Library to testify about certain aerial photographs.

73. Mr. Taylor maintains the aerial photo collection and federal maps at the Thomas Cooper Library. (Tr. 248, lines 23-25)

74. Mr. Taylor provided this Court with testimony and a number of historical aerial photographs.

75. However, Mr. Taylor testified, when asked by the Court, that he had never been to the property that is in dispute in this case (i.e. the dirt road and the locked gate). (Tr. 263,

lines 1-9)

76. While the Court is troubled by the fact that Mr. Taylor never visited the LLC's property (or this property in general), even if this Court were to assume that the photographs are accurate portrayals of the property as they might have existed on the dates shown on the photographs, the photographs do not provide this Court with anything beyond the presence of pathways/possible dirt roads.
77. The aerial photographs do not show fences, gates, obstructions or cars. Perhaps even more important, the aerial photographs do not provide us with any information about who is using the pathways/dirt roads and who has permission to use the pathways/dirt roads. On that same note, the aerial photographs do not provide any information to the Court about adverse or hostile use.
78. In fact, during Mr. Mills' testimony, he acknowledged that the photographs can not tell us who is using the path/dirt road, who had permission nor can the pictures show a gate because of the resolution of the pictures. (Tr. 311 -12, lines 21-7)

Alleged Use of the Dirt Road behind/beyond the Locked Gate

79. The LLC called a number of witnesses to testify about the alleged "use" of the dirt road at issue in this case.
80. The overwhelming majority of the witnesses called by the LLC who testified had permission, of some sort, or were operating under the belief that they had permission to use the dirt road on the Defendant's property beyond the locked gate.
81. The "use witnesses" called by the LLC did not (and could not) say that they used the road in an adverse manner. To the contrary, the "use witnesses" were locked out by the gate and they had to find a way to get access through a locked gate. Some of the

use witnesses procured a combination to a lock, some procured a key and some of the witnesses had their own key to a Santee Cooper lock on the locked gate that was on the gate with the consent of the Nancy Martin's father and Nancy Martin.

82. Notably, none of the principals of the prior owners of the LLC's property (with the exception of the LLC) appeared and testified about the "use" of the dirt road at issue in this case.

83. The LLC called the following "use" witnesses:

- a. Cecil Brazzell, the brother of the principal in Pine Ridge Investments, LLC, testified that he obtained a key to the locked gate across the dirt road on Defendant's property to gain access through the locked gate. (Tr. 94, 3-6) Mr. Brazzell obtained permission from his brother to use the locked gate on the Defendant's property.
- b. Harold Pickerel also testified that he obtained permission from someone to use the dirt road on the Defendant's property. (Tr. 122, lines 19-25) Notably, Mr. Pickerel could only remember one gate between Highway 601 and the LLC's property. (Tr. 116, lines 9-12) But, Mr. Pickerel's memory of a single gate could be attributable to the fact that Mr. Pickerel may have only visited the property on Saturdays when people were hunting the property and the gates were open for hunting on Saturdays. Regardless, Mr. Pickrel had procured the permission of someone to use the dirt road because he had a key to the locked gate.
- c. Algie Campbell testified that he used to use the dirt road before 1960 to fish and hunt. (Tr. 130, 16-24) Mr. Campbell also said that there was no trespassing – the owners knew he was back there using it and they did not mind. (Tr. 130-1, lines

21-6) Mr. Campbell was operating under permission to use the dirt road.

- d. Mack Brazzell testified that the gate was locked and they had a combination to unlock the gate. (Tr. 136, lines 1 -21) Again, Mr. Brazzell had obtained permission (i.e. the combination) from someone to use a combination lock on the gate.
- e. James Lindsay Guy II testified that he doesn't know how his father came to have a lock on the gate. Instead, his father gave him a key to use. (Tr. 166-7, lines 21-4) Mr. Guy had been given permission from his father to use the dirt road.
- f. Ben Higgins testified that the Wessingers installed a pole gate on the dirt road in the mid 70s. He had moved away from the area at the time, but he would visit his parents. (Tr. 180, lines 1-3) Mr. Higgins also testified that he borrowed a key from the Wessingers to get some rocks off of an old house place – that he had obtained permission to use the dirt road. (Tr. 180-1, lines 17-9) Mr. Higgins had been given permission from the Wessingers to use the dirt road.
- g. William Duncan Kirkland, Jr. testified that when he was nine or ten years old, in 1954, he would ride with his father's uncle on the property. (Tr. 188, lines 3-10) Everybody knew his father's uncle and it was fine for his father's uncle to go wherever he wanted to go. (Tr. 193, lines 19-21). Mr. Kirkland, with his father's uncle, had permission to use all of the roads in the area. Notably, the last time Mr. Kirkland recalls visiting this area before 2016 was 1961. (Tr. 196, lines 20-23)
- h. Alan Wooten testified that he has known Jamie Guy all of his life. (Tr. 198, lines 19-22). He had a key to the locked gate so he did not have to ask permission (Tr.

203, lines 6-12). Again, Mr. Wooten had permission to use the locked gate because he was given a key by Mr. Guy.

- i. Timothy Dargan was a forester for a prior owner of the LLC's property. Mr. Dargan prepared a timber map that does not show the gate on Defendant's property. (Plaintiff's Exhibit 38) Mr. Dargan could not recall if there was a gate between 601 and what is now the LLC's property. (Tr. 212-213, lines 25-6) Mr. Dargan specifically said that they would not have installed combination locks on any gate without permission from somebody. (Tr. 215, lines 16-23)
- j. Angus Lafaye, another forester, testified that he had used the dirt road across the Defendant's property. Notably, Mr. Lafaye did not access the property from 1969 – 2000. (Tr. 226, lines 18-24) While Mr. Lafaye says he did not “ask permission” to use the road, he had been granted permission by the Dick Lloyd Trust to get to the Lloyd Trust property (now owned by the LLC). (Tr. 230, lines 25-3) Notably, Mr. Lafaye also had a Santee Cooper key, which would have enabled him to use Santee Cooper's lock on the Defendant's gate. (Tr. 231-2, lines 12-18) Mr. Lafaye had been given permission to access what is now the LLC's property.
- k. Gordon Baker, another forester, was called by the LLC. Mr. Baker testified that he had been given access at some point to the gate and he installed his own lock on the gate. (Tr. 236, lines 4-10) He assumed he had permission to put his lock on the gate. (Tr. 239-40, lines 25-3)
- l. Billy Cate, a real estate agent for Milliken Forestry, testified that when he was involved in the sale of the property he was told that he had permission to use the dirt road on Defendant's property (Tr. 245, lines 9-14)

84. The LLC's own representative, James Podell, used the dirt road by procuring the combination of a lock from Harold Pickerel (Tr. 323, lines 14-17)
85. Mr. Podell himself acknowledged that permission was necessary to use the dirt road on Nancy Martin's property because he asked the DMHC for a key to the locked gate. (Tr. 345-6, lines 21-10)
86. When Mr. Podell was denied a key to the locked gate, he actually cut the chain on the gate, twice, and placed his own lock on the chain, both of which were ultimately removed. (Tr. 346-7, lines 20-2)
87. Mr. Podell and nearly all of the other witnesses called by the LLC testified that gates are designed to keep people out of the property. (James Podell – Tr. 338, lines 11-13; Carl Brazell – Tr. 98, lines 13-15; Harold Pickrell – Tr. 123, lines 10-15; Mack Brazzell – Tr. 141, lines 13-18; James Lindsay Guy, II – Tr. 167, lines 8-11; Alan Wooten – Tr. 203, lines 12 – 13; Angus Lafaye – Tr. 227, lines 18-24; Gordon Baker – Tr. 239, lines 23-24; Claude Campbell Dep. 41, lines 15-19)
88. Mr. Podell acknowledged that he knew that there was a locked gate on someone else's property that separated his property from 601 when he first looked at the property. (Tr. 343, lines 6-16)
89. Claude Campbell, a former member of the LLC, got through the locked gate by using a combination lock. (Campbell Dep. 8, lines 13-16)
90. Mr. Campbell testified that he went through the gate 4 – 6 times and the gate was locked every time he went through the gate. (Campbell Dep. 24, lines 19-25 and Campbell Dep. 25, lines 1-2)
91. Mr. Podell also acknowledged that he saw the end of county maintenance sign. (Tr.

344, lines 2-11)

Miscellaneous Facts

92. The only thing that Mr. Podell reviewed before closing was the Gonzales Plat and he acknowledges that the Gonzales Plat does not have a single word on it that indicates anyone has a right to use the dirt road on the Defendant's property. (Tr. 345, lines 12-16)
93. After the LLC purchased the property, the LLC spent \$70,000.00 in upgrades to the pond dam. After the repairs were completed, the dam was eighteen feet wide and Mr. Podell was able to drive a bulldozer across the dam. (Tr. 352, lines 1-18)
94. The LLC repaired the dam so that timber could be harvested and log trucks could go across the dam. (Campbell Dep. 34, lines 8-18)
95. Mr. Podell also testified that he made an offer to purchase the triangular tract of property (approximately 65 acres), now owned by the Defendant, before Nancy Martin purchased the tract. The offer was conditioned upon the owners of the property clearing up the access issue through the locked gate on the Defendant's property. (Tr. 352-3, lines 19-17)
96. Mr. Podell procured an address from Richland County but he did not tell the Richland County employee that there were two locked gates separating the public road from the property he was seeking to have addressed nor did Mr. Podell tell the Richland County employee anything about this litigation. (Tr. 355-6, lines 3-2)
97. Mr. Podell testified at trial that he believed his property to be worth about the same amount of money that he paid for the property, \$2,014,000.00. (Tr. 362, lines 14-24)

III. CONCLUSIONS OF LAW

A. Deeded Right of Access

The LLC claims an express easement in its chain of title was granted in the Defendant's chain of title. The Plaintiff's own witnesses (Anna Williams – Title Searcher and Michael Mills – Land Surveyor) both testified unequivocally that there was no recorded easement in the Defendant's chain of title. Notably, Michael Mills was qualified as an expert in surveying land. After carefully reviewing the deeds, plats and listening to the testimony of the witnesses at the trial of this matter, I conclude that there is no deeded right of access or express easement to the Plaintiff in the Defendant's chain of title. Even if this Court were to find the existence of an express easement, the Defendant's actions and her predecessors in title, have, over the 44 years before this lawsuit was filed (1970-2014), extinguished any purported rights and/or easement through adverse possession.

B. Permanent Prescriptive Easement

A permanent prescriptive easement is not implied by law. *Bundy v. Shirley*, 412 S.C. 292, 304, 772 S.E.2d 163, 169 (2015). It is established by the conduct of the dominant estate. *Id.* Under South Carolina law, to establish a prescriptive easement the party claiming an easement must show, by clear and convincing evidence, (1) continued and uninterrupted use or enjoyment of the right for a period of twenty years; (2) the identity of the thing enjoyed; and (3) use or enjoyment which is either adverse or under a claim of right. See *id.* at 304, 772 S.E.2d at 169-70 (emphasis by Court).

The Plaintiff cannot establish the necessary elements for a prescriptive easement. “[E]vidence of permissive use defeats the establishment of a prescriptive easement because use that is permissive cannot also be adverse or under a claim of right. Stated another way, when a claimant uses property with the permission of the owner, he or she acknowledges the owner's rights and uses the

property without an affirmative, hostile act toward the owner's rights." *Id.* at 310, 772 S.E.2d at 173 (internal citations omitted).

In *Bundy v. Shirley*, a case with facts strikingly similar to this case, our Supreme Court addressed the issue of permissive use as it relates to prescriptive easements. The Court held that the claimant's claim of a prescriptive easement was defeated because the property owner gave the claimant a key to unlock the cable that blocked the road and later gave him permission to construct a gate on the property in the same location as the cable. *See id.* at 311-12, 772 S.E.2d at 173-74. The court, relying on established precedent, found that the claimant's use of the disputed road was entirely permissive. *Id.*, *see also Paine Gayle Properties, LLC v. CSX Transp., Inc.*, 400 S.C. 568, 584, 735 S.E.2d 528, 537 (2012) ("The asking and obtaining of permission...stamps the character of the use as not having been adverse, or under claim of right, and therefore as lacking that essential element which was necessary for it to ripen into a right by prescription."). Only after the property owner revoked the claimant's permission to use the road did the claimant begin to use the disputed road in a manner hostile to the owner's rights. *See id.*

Like *Bundy*, the installation of the gate (in 1970) and blocking access to the Plaintiff's property leads to the conclusion that the Plaintiff's use of the road was by permission, not adverse to the Defendant's rights. Defendant and her predecessor in interest granted permission to others by allowing them to gain access through the use of a key or combination lock on a locked gate. *See Bundy*, 412 S.C. at 311, 772 S.E.2d at 173 (stating the presence of a locked gate is strong evidence of permissive use). The locks that could not be identified, or that belonged to those who used the property without the Martin's express permission, were removed from the gate on at least six different occasions between 1970 and 2014 through a series of "lock cleanings" and other locks were "snipped" off from time to time. There is no evidence that the Plaintiff or its predecessor in interest made any distinct and positive assertion of a right hostile to

the Martins after the gate was erected on the Martin Property, with the single exception of Mr. Podell, the LLC's representative, cutting the chain and inserting his lock (once Mr. Podell was denied access). Moreover, James Podell admitted that he asked DMHC for a key to the locked gate, i.e. Mr. Podell asked for permission to use the locked gate thereby affirming Nancy Martin's superior right. Therefore, LLC's use of the road has never been adverse or under a claim of right. It has always been permissive.

Through the various "use witnesses," the LLC has attempted to demonstrate that the locked gate did not stop people from using the private dirt road. As a preliminary matter, the use witnesses had all obtained permission from one source or another in order to access the private dirt road beyond the locked gate. While the source of the permission may not have been from the owner, the character of use by the use witnesses was always permissive in nature. Notwithstanding that fact, the LLC seems to suggest that if the landowner is unsuccessful in stopping trespassers and/or people that have procured permission, a potential LLC can successfully argue that he/she has met the burden of proof to establish a prescriptive easement. But, the South Carolina Supreme Court has spoken on this issue. In particular, South Carolina's Supreme Court has set forth the following rule:

A landowner . . . is not required to battle successfully for his rights. It is enough if he asserts them to the other party by an overt act, which, if the easement existed, would be a cause of action. Such an assertion interrupts the would-be dominant owner's impression of acquiescence, and the growth in his mind of a fixed association of ideas; or, if the principle of prescription be attributed solely to the acquiescence of the servient owner, it shows that acquiescence was not a fact.

Pittman v. Lowther, 363 S.C. 47, 51-52, 610 S.E.2d 479, 481 citing *Garrett v. Mueller*, 144 Ore. App. 330, 927 P.2d 612 (Or. App. 1996, 927 P.2d at 617 (quoting *Brayden v. New York, H.H. & H.R. Co.*, 172 Mass. 225, 51 N.E. 1081, 1081-82 (1898))).

The South Carolina Supreme Court in *Pittman* went on to say that “[w]e conclude actions are sufficient to interrupt the prescriptive period when the servient landowner engages in overt acts, such as erecting physical barriers, which causes a discontinuance of the dominant landowner’s use of the land, no matter how brief.” *Pittman* at 52. In essence, the LLC would suggest that a landowner must take all actions necessary to successfully block people from using the road – taken to its logical end, perhaps even suggesting that a landowner would be required to post a guard at the locked gate. But, *Pittman* clarified this rule and clearly states that a landowner is not required to successfully keep people out. The landowner is only required to engage in overt acts (erecting physical barriers or threats). As such, the erection of the locked gate in 1970 bars and precludes the LLC from asserting that it has a prescriptive easement because the erection of a locked gate prevents the Plaintiff from establishing the first element of a prescriptive easement, i.e. continued and uninterrupted use or enjoyment of the right for a period of twenty years. As such, the Plaintiff’s claim of a prescriptive easement fails.

C. Dedication of the Road to Public Use

Under certain circumstances, which do not exist here, private property can be dedicated to public use. “Dedication requires two elements. First, the owner must express in a positive and unmistakable manner the intention to dedicate his property to public use. Second, there must be, within a reasonable amount of time, an express or implied public acceptance of the property offered for dedication. *Town of Kingstree v. Chapman*, 405 S.C. 282, 302, 747 S.E.2d 494, 504 (2013). The party claiming the dedication has the burden of establishing dedication and public acceptance. *Id.*

The LLC does not contend that Defendant has made an express dedication. Rather, the LLC claims that the Defendant’s intention to dedicate should be implied from the circumstances.

“Absent an express grant, one who asserts a dedication must demonstrate conduct on the part of the landowner clearly, convincingly, and unequivocally indicating the owner’s intention to create a right in the public to use the property in question adversely to the owner.” *Id.* at 302, S.E.2d at 504. South Carolina courts have recognized two types of implied dedication. *Id.* First, where the question of dedication arises from the sale of land with references to maps or plats. *Id.* Second, when the dedication arises from an abandonment to or acquiescence in public use. *Id.* The LLC argues that the property was dedicated under the second method—abandonment to or acquiescence in public use.

The LLC cannot prove an intention to abandon the roadway in issue or acquiesce to the public’s use of the road. For more than 40 years, Nancy Martin and her predecessors in interest, have taken action to prevent the public use of the road by maintaining a locked gate. The constant presence of the locked gate clearly demonstrates an intention to keep the road under Defendant’s ownership. Any argument stating that use of the road by certain members of the public shows the Defendant’s intention to dedicate the road should be rejected. “The essence of dedication is that it shall be for the use of the **public at large**.” *Id.* at 304, 747 S.E.2d 505 (emphasis added). Nancy Martin and her predecessors in interest allowing certain people to use the road, i.e. giving permission to certain persons, cannot be construed as an intention to dedicate the road to the public at large.

The LLC can not show acceptance of the road. “As with intention to dedicate, no formal acceptance by a public authority is necessary to show public acceptance. Acceptance may be implied by the public or a public authority continuously using or repairing the property. The use, repair, and working of the streets by public authorities is a mode of acceptance.” *Id.* at 303, 747 S.E.2d at 505. Here, Richland County has posted a sign approximately 2914 feet in front of the

locked gate stating that county maintenance ends at that point. The portion of the road in question is not, nor has it in the past, been maintained by Richland County or Kershaw County. The fact that Richland County maintains a portion of the road before the locked gate has no bearing on this case. The only evidence of maintenance of the road is by conjecture and speculation by two witnesses in this case and the greater weight of the evidence is that a caretaker of the Guy property may have given liquor to maintenance personnel to get the road scraped (Tr. 167, lines 12-15) Further supporting that there has been no public acceptance, Richland County's Right of Way Agent, Randy Byrd, testified that the road is a private road. The dirt road at issue on the Defendant's property is located in Richland County. Richland County's records clearly indicate that the County deems the road to be a private road. The LLC has not established dedication and acceptance and the dirt road on the Defendant's property is clearly a private road.

D. Adverse Possession/Prescription by the Servient Tenement

Even if this Court were to find that an easement through Nancy Martin's property existed at one point in time, Nancy Martin and her predecessor's in interest have taken ownership of the former easement through adverse possession. Nancy Martin has asserted a counterclaim for Adverse Possession. As set forth herein, Nancy Martin and her predecessors in interest have maintained a locked gate across the private dirt road in excess of 40 years. As such, Nancy Martin has established all of the required elements of adverse possession. In South Carolina, the party asserting adverse possession must show continuous, hostile, open, actual, notorious and exclusive possession for at least ten years. *Jones v. Leagan*, 384 S.C. 1, 10, 681 S.E.2d 6, 11 (2009).

“Generally, a claimant’s possession to constitute adverse possession must be such as to indicate his exclusive ownership of the property, and not only must his possession be without subserviency to, or recognition of the title of the true owner, but it must be hostile thereto and to the whole world.” *Gregg v. Moore*, 226 S.C. 366, 370, 85 S.E.2d 279, 281 (1954). The locked gate across the private road, located entirely on the Nancy Martin’s property, clearly demonstrates the Defendant’s exclusive and hostile possession of the property. South Carolina courts have repeatedly found that the fencing or gating of property is clear evidence of one exercising dominion and control over the property in a manner that is adverse. *See e.g., King v. Hawkins*, 282 S.C. 508, 511, 319 S.E.2d 361, 362 (1984). Similarly, South Carolina courts have determined that installing fencing and making other improvements to property constitutes open and notorious acts for the purposes of proving adverse possession. *Jones*, 384 S.C. at 14, 681 S.E.2d at 14. In addition to proving hostile, open, actual, notorious and exclusive possession, Nancy Martin can show that these elements have existed continuously for a period greater than ten years because the gate across the road at issue was erected in 1970. The private dirt road has been blocked/obstructed by the locked gate since 1970. The overwhelming weight of the evidence and testimony in this case establishes that any use of the locked gate on the property that is now owned by Nancy Martin was with the permission of Nancy Martin and/or with the Defendant’s predecessor’s in title. As such, Nancy Martin and her predecessors have adversely possessed any rights that the LLC and/or the LLC’s predecessor’s in interest may have had in the private dirt road.

E. Statute of Limitations

The LLC’s claims, if any, are barred by the statute of limitations pursuant to S.C. Code § 15-3-380, S.C. Code § 15-3-360, and S.C. Code § 15-3-340. The statute of limitations begins to

run at the time the cause of action accrues. *Harvey v. S.C. Dep't. of Corr.*, 338 S.C. 500, 508, 527 S.E.2d 765, 769 (Ct. App. 2000) (citing *Matthews v. City of Greenwood*, 305 S.C. 267, 269, 407 S.E.2d 668, 669 (Ct. App. 1991)). “Thus, a particular cause of action accrues at the moment when the plaintiff has a legal right to sue on it.” *King v. James*, 388 S.C. 16, 25-26, 694 S.E.2d 35, 40 (Ct. App. 2010).

“Statutes of limitations are not simply technicalities.” *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). “One purpose of a statute of limitations is ‘to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights.’” *Id.* (quoting *McKinney v. CSX Transp., Inc.*, 298 S.C. 47, 49-50, 378 S.E.2d 69, 70 (Ct. App. 1989)); see also *Transp. Ins. Co. & Flagstar Corp. v. S. Carolina Second Injury Fund*, 389 S.C. 422, 428, 699 S.E.2d 687, 690 (2010); *Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 618, 698 S.E.2d 879, 883 (Ct. App. 2010). The LLC’s claims are barred by three distinct statute of limitations, S.C. Code § 15-3-380, S.C. Code § 15-3-360 and S.C. Code § 15-3-340.

1. S.C. Code § 15-3-380

The LLC is barred from pursuing its claims by virtue of S.C. Code § 15-3-380, which provides as follows:

No action shall be commenced in any case for the recovery of real property or for any interest therein against a person in possession under claim of title by virtue of a written instrument unless the person claiming, his ancestor or grantor, was actually in the possession of the same or a part thereof within forty years from the commencement of such action. And the possession of a defendant, sole or connected, pursuant to the provisions of this section shall be deemed valid against the world after the lapse of such a period.

This statute is a statute of limitations upon an action for the recovery of any interest in real property and expressly gives good title. Of the three limitations statutes that apply, § 15-3-

380 is the most liberal and allows for the longest limitations period, requiring a Plaintiff to commence an action within forty years from the time when its rights were imposed upon or possession becomes “valid against the world.”.

Here, Defendant holds legal title to property which the LLC seeks an interest in, i.e. the LLC is seeking an easement over the Martin property. This action was filed by the LLC in 2014; therefore, the operable year for the 40 year statute of limitations is 1974. The 40-year statute of limitations acts as a complete bar to the LLC’s civil action. The locked gate was installed on the dirt road in 1970. In turn, the 40-year statute of limitations began to run when the locked gate was installed across the dirt road. *See Woods v. Bivens*, 292 S.C. 76 (S.C. 1987) citing S.C. Code 15-3-380 as a complete bar to an action seeking a property right.

Any right of action by the LLC and/or its predecessors in title should have been commenced against Defendant and/or Defendant’s predecessor’s in title, on, or before, 2010. The installation of the locked gate in 1970 on the dirt road “started the statute of limitations clock.” LLC filed this action against Nancy Martin on March 18, 2014, some 44 years after the locked gate was installed on the dirt road. Therefore, to the extent that the LLC may have had any rights in the dirt road, Defendant’s possession of the dirt road became valid against the world in 2010 *at the latest*, and the LLC’s causes of action must be dismissed as a matter of law.

2. S.C. Code § 15-3-360

The LLC is also barred from pursuing its claims pursuant to S.C. Code § 15-3-360, which provides as follows:

No entry upon real estate shall be deemed sufficient or valid as a claim unless an action be commenced thereupon **within one year after the making of such entry** and within **ten years from the time when the right to make such entry descended or accrued**.

The LLC commenced this action on March 18, 2014. Therefore, under S.C. Code §

15-3-360, the LLC's action may only be maintained if it (1) accessed the dirt road as a matter of right on or after March 18, 2013 and (2) was possessed of the right to access Northeast Shady Grove Road on the LLC's property within ten years of March 18, 2014 (on or after March 18, 2004).

The last time Mr. Podell and Mr. Campbell accessed Northeast Shady Grove Road through the Martin's property was before their lock was removed in 2009. Setting aside the fact that access was not as a matter of right because the LLC's use was permissive, at the latest, the LLC should have filed its lawsuit on or before 2010 to satisfy the first requirement of § 15-3-360. And even assuming the LLC did so, the LLC's action is still barred because this action was commenced more than ten years from the time when the LLC's right to use the disputed road accrued. Because the gate was erected beyond the terminus of Northeast Shady Grove Road no later than 1970 (the last year the LLC could have used the road without permission), any right of action by the LLC and/or its predecessors in title should have been commenced against Nancy Martin's predecessor in title (E.F. Martin, Jr. and/or Jessie Dunn Martin) on, or before, 1980.

As such, the LLC's, along with the LLC's predecessors in title, failure to exercise reasonable diligence and pursue its claims against Defendant bars the LLC from maintaining the causes of action against Nancy Martin that relate to the LLC's right to use or access the dirt road through Defendant's property.

3. S.C. Code § 15-3-340

Finally, as an action for the recovery of real property, this action is also governed by S.C. Code § 15-3-340, which states that an action for the recovery of real property may not be maintained "unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seized

or possessed of the premises in question within ten years before the commencement of the action.” S.C. Code Ann. § 15–3–340 (emphasis added); *Portside Owners Ass’n, Inc. v. S. Beach Racquet Club, Inc.*, No. 2008-UP-153, 2008 WL 9837329 (S.C. Ct. App. Mar. 11, 2008).

As set forth herein, neither the LLC nor its predecessors in interest were “in possession” of an easement over the Martin Property because the LLC and its predecessors in interest did not access the road as a matter of right after the gate was erected in 1970. To satisfy the limitations period under S.C. Code § 15–3–340, the LLC would have to prove it or Pine Ridge Investments used Northeast Shady Grove Road as a matter of right anytime after March 18, 2004.

Permission cannot and does not amount to “possession” within the meaning of the statute. There is no evidence before the Court that the LLC possesses a deeded easement or that the LLC or its predecessor ever accessed the road without permission. The testimony is undisputed; only those with permission from the Martin family were allowed to place a lock on the gate. The DMHC would remove any unidentified locks on a regular basis. Mr. Podell testified he replaced Mr. Brazell’s combination lock with his own lock when he purchased the 1023.7 acre tract in 2009, and his lock was removed that same year. The earliest the LLC, or its predecessor in title, could have used the road as a matter of right (without permission) was before the gate was erected in 1970. Therefore, pursuant S.C. Code § 15-3-340, the statute of limitations ran in 1980, and the LLC’s claims are barred as a matter of law.

WHEREFORE, this Court finds for Nancy Martin on all claims asserted by the LLC. This Court also finds for Defendant on the Defendant’s Counterclaim. There is no easement (express, implied, prescriptive or public dedication) across the lands of the Defendant, Nancy Dunn Martin. Even if this Court were to find that an easement, of any kind, did exist at one time, Nancy Martin and her predecessors in title “locked out” the world by installing a locked gate in

1970. Additionally, the Defendants and her predecessors in title have also adversely possessed the land (i.e. the private dirt road) beyond the gate by installing the locked gate beyond the terminus of Northeast Shady Grove Road. Moreover, to the extent that there ever was an easement, of any kind, the statute of limitations has expired on any claim(s) that the LLC and/or the LLC's predecessors in interest may have had as a result of the locked gate that was installed beyond the terminus of Northeast Shady Grove Road.

IT IS SO ORDERED.

The Honorable Joseph M. Strickland
Master in Equity for Richland County

May ____, 2016

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Country Properties, LLC

☐ Plaintiff

v.

Nancy Dunn Martin

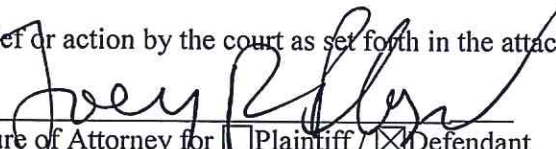
☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2014-CP-40-1805

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: John W. Wells, Bar No. Address: P.O. Box 10, Lugoff, SC 29078 phone: 803.438.4200 fax: e-mail: jwells@baxleywells.com other:	Defendant's Attorney: Joey R. Floyd, Bar No. 68491 Address: P.O. Box 61110, Columbia, SC 29260 phone: 803.252.7693 fax: 803.254.5719 e-mail: jfloyd@brunerpowell.com other:
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information Nature of Motion: Motion to Alter/Amend - To be heard before Judge Strickland Estimated Time Needed: 30 Minutes Court Reporter Needed: ☒ YES / ☐ NO	
SECTION II: Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.  Signature of Attorney for ☐ Plaintiff / ☒ Defendant November 9, 2016 Date submitted	
SECTION III: Motion Fee ☒ PAID - AMOUNT: 25.00 ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:	
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE _____ CODE: _____ Date: _____
CLERK'S VERIFICATION Date Filed: _____ Collected by: _____ ☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____	

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CIVIL ACTION NO. 2014-CP-40-1805
	)	
Country Properties, LLC,	)	
	)	
Plaintiff,	)	DEFENDANT'S NOTICE OF MOTION
	)	AND MOTION TO ALTER OR AMEND
vs.	)	PURSUANT TO RULES 59(e) AND 52(b),
	)	SCRCP
	)	
Nancy Dunn Martin,	)	
	)	
Defendant.	)	

YOU WILL PLEASE TAKE NOTICE that, Pursuant to Rule 59(e), SCRCP, Defendant, Nancy Dunn Martin ("Defendant" or "Martin"), by and through her undersigned attorneys, respectfully moves the Court to alter or amend its Order entered on, or about, September 27, 2016 (the "Order"), written notice of which was received on November 1, 2016. Because the Court sat as the finder of fact in the trial of this matter, Defendant also brings this motion pursuant to Rule 52(b), SCRCP, to amend, as necessary, the Court's findings of fact.

Defendant hereby moves that the Order be altered or amended on the following grounds:

1. The Court erred in finding that the 384 acres of Plaintiff's tract located south of Raglin¹ Creek has no access without accessing the private dirt road on the Defendant's property beyond the terminus of the public portion of Northeast Shady Grove Road. The Plaintiff's property has no less than three points of access to public roads without using the dirt road on the Defendant's property.
2. The Court erred in finding that the 384 acres of Plaintiff's tract located south of Raglin Creek has no access without accessing the private dirt road on the Defendant's property

¹ The creek is actually "Raglins Creek;" however, it is referred to in the Order as "Raglin Creek." For purposes of this motion, it will be referred to as "Raglin Creek."

beyond the terminus of Northeast Shady Grove Road because the Plaintiff did not assert a claim of necessity and Counsel for the Plaintiff stipulated at trial that there was no claim for an easement by necessity.

3. The Court erred in finding that Raglin Creek is a substantial natural barrier to the Plaintiff's ability to access the 384 acres of its property south of Raglin Creek and that Raglin Creek limits the ability of the Plaintiff to access its lands south of Raglin Creek. The Plaintiff has access to its property through its own property.
4. The Court erred in finding there was widespread public usage of the dirt road on the Defendant's property beyond the end of the county road² from 1945 through 1969.
5. The Court erred in finding that the of the dirt road on the Defendant's property was a public road until 1970.
6. The Court erred in failing to consider the testimony of Randy Byrd, the Richland County Right of Way Agent, who testified where Northeast Shady Grove Road starts and where Northeast Shady Grove Road ends, according to Richland County's records.
7. The Court erred in failing to consider the testimony of Richland County's Right of Way Agent, Randy Byrd, who testified that the dirt road on the Defendant's property is not and has never been a public road.
8. The Court erred in failing to consider Richland County's maps (Defendant's Exhibit 9) that demonstrates the private dirt road on the Defendant's property is not a public road.
9. The Court erred in finding that the sole method of closing a public road is pursuant to S.C. Code § 57-9-10.

² Based on the undisputed testimony of Randy Byrd, the Right of Way Agent for Richland County.

10. Assuming that the dirt road on the Defendant's property was public, the Court erred in finding that the road was not abandoned by the public.
11. The Court erred in failing to consider the Plaintiff's own expert's testimony where he testified that he failed to find an easement on the Defendant's property.
12. The Court erred in failing to consider the Plaintiff's title abstractor's testimony that she failed to find an easement on the Defendant's property.
13. The Court erred in finding that the Plaintiff's deeds to the Plaintiff's property conveyed an easement(s) appurtenant to the Plaintiff's property.
14. The Court erred in finding that the language in the in deeds conveyed an easement.
15. To the extent there is an easement by grant, the Court erred in failing to find that the Plaintiff's use of the alleged easement does not exceed the scope of the easement.
16. The Court erred in finding that the Plaintiff and its predecessors in title used the dirt road on the Defendant's property for a period exceeding twenty (20) years.
17. The Court erred in finding that the Plaintiff and its predecessors in title use of the dirt road on the Defendant's property was continuous and uninterrupted for a twenty (20) year period.
18. The Court erred in finding that the Plaintiff and its predecessors in title use of the private dirt road beyond the terminus of Northeast Shady Grove Road was adverse to the rights of the Defendant and her predecessors in title.
19. The Court erred in finding that the Plaintiff and its predecessors in title use of the dirt road on the Defendant's property was open and notorious.
20. The Court erred in finding that the Defendant's attempts to prevent adverse use of the private dirt road on the Defendant's property failed.

21. The Court erred in considering whether the Plaintiff's and its predecessors in interest use of the dirt road on the Defendant's property was under a claim of right in determining whether a prescriptive easement exists.
22. The Court erred in finding that the Plaintiff and its predecessors in title use of the disputed portion of the dirt road on the Defendant's property was under a claim of right.
23. The Court erred in finding there was no evidence that the Defendant gave the Plaintiff or any other person(s) using the dirt road on the Defendant's property permission to use the road.
24. The Court erred in finding that the Plaintiff, in regard to the dirt road on the Defendant's property, proved the identity of the thing enjoyed.
25. The Court erred in finding that the Plaintiff proved the elements of an easement by prescription.
26. The Court erred in finding that the Defendant failed to prove that it had adversely possessed the disputed portion of the dirt road on the Defendant's property for a period of ten (10) years.
27. The Court erred in concluding as a matter of law that the Plaintiff met its burden of proof as to the use of the disputed road for a twenty (20) year period.
28. The Court erred in concluding as a matter of law that the Plaintiff met its burden of proof as to identity of the thing enjoyed.
29. The Court erred in failing to delineate and define the purported prescriptive period that gives rise to the prescriptive easement.

30. The Court erred in concluding as a matter of law that the Plaintiff met its burden of proof as to proving that the Plaintiff and its predecessors in title use of the dirt road on the Defendant's property was adverse.
31. The Court erred in concluding as a matter of law that the Plaintiff and its predecessors in title proved that its/their use of the dirt road on the Defendant's property was under a claim of right.
32. The Court erred in concluding as a matter of law that the Plaintiff proved that it has a twenty (20) foot wide easement by grant over the lands of the Defendant which is located on the dirt road on the Defendant's property.
33. The Court erred in concluding that the dirt road on the Defendant's property is a private easement appurtenant in favor of the Plaintiff.
34. The Court erred in finding that the dirt road on the Defendant's property is a public road.
35. The Court erred in concluding that Plaintiff's claims are not barred by the Statute of Limitations, S.C. Code §§ 15-35-340, 360 and 380.
36. The Court erred in concluding that the Defendant has not adversely possessed the disputed portion of Northeast Shady Grove Road for a period of ten (10) years.
37. The Court erred, as a matter of law, in failing to consider the presence of locked gate (i.e. a physical barrier), located wholly on the Defendant's property, discontinued the non-permissive use of the dirt road on the Defendant's property to interrupt the purported prescriptive period.
38. The Court erred in failing to determine that the use of the dirt road on the Defendant's property by the witnesses called by the Plaintiff testified that they used the road by obtaining permission from someone, i.e. permissive use.

39. The Court erred in failing to consider the Plaintiff's representative asking for permission to use the dirt road on the Defendant's property.
40. The Court erred in failing to find that permissive use can never rise to the level of adverse use.
41. The Court failed to address and rule upon the Defendant's Counterclaim for Adverse Possession/Prescription by the Servient Tenement.
42. The Court failed to address the abandonment of the easement since it found that there was an easement. The Court should find that the easement was abandoned.

WHEREFORE, for the foregoing reasons, the Defendant respectfully requests that the Court alter or amend the Order in the following respects:

- (a) That there was no grant of an express easement across the Defendant's property.
- (b) That the Plaintiff failed to establish that it has a prescriptive easement to use the dirt road on the Defendant's property beyond the end of Northeast Shady Grove Road.
- (c) That the Plaintiff failed to establish all of the necessary elements of a prescriptive easement, in that the Plaintiff failed to establish continued and uninterrupted use or enjoyment for a period of twenty (20) years and the Plaintiff failed to prove use or enjoyment which was adverse or under a claim of right.
- (d) That all "use" of the private dirt road on the Defendant's property proffered by the Plaintiff was permissive use and to the extent that there was any stealthy use of the private dirt road, the stealth use was stopped when discovered.
- (e) That the Plaintiff failed to establish that it has a twenty foot (20') easement by grant over the disputed portion of Northeast Shady Grove Road.

- (f) That the private dirt road on the Defendant's property is not, and never was, a public road.
- (g) That the Plaintiff's claims are barred by the applicable Statutes of Limitation, SC Code §§ 15-35-340, 360 and 380.
- (h) That it was undisputed a locked gate has been located on the Defendant's property, beyond the terminus of the public portion of Northeast Shady Grove Road, in excess of 40 years. As such, the locked gate serves as a complete bar to the Plaintiff's claims in this action because the locked gate is absolutely clear evidence that all use of the dirt road behind the locked gate was strictly permissive use. To the extent that there was stealthy use of the private dirt road beyond the locked gate, the stealth use was eliminated when it was discovered.
- (i) The presence of a locked gate (i.e. a physical barrier), located wholly on the Defendant's property, discontinued the non-permissive use of the dirt road on the Defendant's property to interrupt the purported prescriptive period.
- (j) That the Defendant and/or her predecessors in title have established that she and/or her predecessors in title adversely possessed the road for a period of ten (10) years.
- (k) That to the extent that there may have been an easement, which is disputed by the Defendant, the easement rights have been adversely possessed by the Defendant and/or her predecessors in title.
- (l) That there is no evidence of any intent for the private dirt road to be dedicated to public use and that there is no evidence supporting the acceptance of the private dirt road for public use.

(m) That the Order be clarified, altered amended and/or modified to ascertain whether the Court is ruling that the private dirt road on the Defendant's property is a public road or whether the Court has determined that the road is subject to a private easement since the Order, as written, is inconsistent.

Respectfully Submitted,

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November 9, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CIVIL ACTION NO. 2014-CP-40-1805
	)	
Country Properties, LLC,	)	
	)	
Plaintiff,	)	MEMORANDUM IN SUPPORT OF
	)	DEFENDANT'S MOTION TO ALTER OR
vs.	)	AMEND PURSUANT TO RULES 59(e)
	)	AND 52(b), SCRCP
	)	
Nancy Dunn Martin,	)	
	)	
Defendant.	)	

Defendant, Nancy Dunn Martin ("Martin" or Defendant") submits this memorandum of law in support of her motion to alter or amend the Final Order entered on September 27, 2016 in this matter (the "Order").¹ In its Order, the Court held that:

- (1) The Plaintiff, Country Properties, LLC ("Plaintiff") had a prescriptive easement and an easement by grant to use a dirt road, behind a locked gate, located entirely on the Defendant's property.
- (2) The Plaintiff has an easement by grant.
- (3) The dirt road, behind a locked gate on the Defendant's property (the gate has been in place in excess of 40 years), beyond the terminus of what Richland County designates as the end of Northeast Shady Grove Road is a public road.
- (4) The Plaintiff's claims were not barred by the applicable statute of limitations.
- (5) The Defendant failed to establish that she adversely possessed any easement rights that the Plaintiff and/or its predecessors may have had in the private dirt road beyond the terminus of the public portion of Northeast Shady Grove Road.

¹ Written notice of the entry of judgment was received on November 1, 2016. Defendant timely filed the subject motion on November 9, 2016.

Defendant respectfully requests that Court reconsider its findings and conclusions and that it alter and/or amend the Order based on the arguments in this memorandum. The arguments below are substantially similar to the findings and conclusions set forth in the Defendant's Proposed Order submitted to the Court on May 13, 2016, attached hereto as **Exhibit A**.

I. The Court Erred in Finding That Plaintiff Established an Easement by Prescription and an Easement by Grant.

A. There is no Easement by Prescription

In order to establish an easement by prescription, a party must show: (1) The continued and uninterrupted use or enjoyment of a right for a full period of twenty (20) years; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse, or under a claim of right. *Simmons v. Berkeley Electric Cooperative, Inc.*, 2016 S.C. LEXIS 325 (2016) (citing *Williamson v. Abbott*, 107 S.C. 397, 400, 93 S.E. 15, 16 (1917)). It should be noted that in *Simmons*, the Supreme Court clarified that “[b]y placing a ‘comma’ after the term ‘adverse’, [the Supreme Court] intended to modify the term ‘adverse,’ not create another method to establish a claim. *Id.*”

Here, the Court found that the Plaintiff established all of the necessary elements for a prescriptive easement.² This finding was in error. As to the first element, continuous or interrupted use for a period of twenty (20) years, the Court found that the Plaintiff's and its predecessors' disregard for the Defendant's and its predecessors' locked gate as evidence of adverse for a period of twenty-years. This ruling is in direct conflict with South Carolina precedent. In *Pittman v. Lowther*, 363 S.C. 47, 610 S.E.2d 479 (2005), our Supreme Court addressed the issue of “what

² As an aside, Plaintiff only seeks to establish an easement by prescription and an easement by grant. Counsel for the Plaintiff conceded at trial that “we did not claim an easement by necessity, which is an easement because [Plaintiff] has no other access.” See Trial Trans., 18:19-21. As such, the Court's finding that Plaintiff has no access to its land south of Raglin's Creek except via the easement at issue, is an unnecessary finding of fact. Furthermore, the finding is unsupported by the evidence in this case as there is testimony indicating that the Plaintiff can access the property south of Raglin's Creek across a road/dam in place over Raglin's Creek.

constitutes an interruption in the context of establishing a prescriptive easement where the owner of the servient tenement erects barriers that are repeatedly ignored by the owner of the dominant tenement.” The facts of *Pittman* are similar to the case at hand. In *Pittman*, Respondent, a landowner, erected a gate and other barricades in an attempt to keep Petitioner, a neighboring landowner, from using a road which crossed Respondent’s land. *Id.* at 49, 610 S.E.2d at 480. Petitioner filed suit seeking to establish a prescriptive easement over Respondent’s land. *Id.* The trial court found ruled in favor of the Petitioner, finding that Petitioner had demonstrated a prescriptive easement existed. *Id.* The Court of Appeals reversed finding that the trial court erred in ruling the Petitioner enjoyed uninterrupted adverse use of the land for a period of twenty years. *Id.* Specifically, the Court of Appeals found that the “[r]espondent’s repeated attempts to prevent [the] Petitioner from crossing Respondent’s land constituted interruptions in Petitioner’s use and enjoyment of the disputed portion of [the road]”. The Supreme Court affirmed the decision. The Supreme Court declined to find Petitioner’s “persistent trespassing” as proof of adverse use. Instead, the Court embraced the reasoning of Justice Oliver Wendell Holmes, Jr., reasoning which has been followed by other jurisdictions:

A landowner...is not required to battle successfully for his rights. It is enough if he asserts them to the other party by an overt act, which, if the easement existed, would be a cause of action. Such an assertion interrupts the would-be dominant owner’s impression of acquiescence, and growth in his mind of a fixed association of ideas; or, if the principle of prescription be attributed solely to the acquiescence of the servient owner, it shows that acquiescence was not a fact.

Id. at 51-52, 610 S.E.2d at 481 (quoting *Garret v. Mueller*, 144 Or. App. 330, 927 P.2d 612 (1996)).

The court further stated

[A]ctions are sufficient to interrupt the prescriptive period when the servient landowner engages in overt acts, *such as erecting physical barriers*, which cause a discontinuance of the dominant landowner’s

use of the land, *no matter how brief*. In addition to physical barriers, verbal threats which convey to the dominant landowner the impression the servient landowner does not acquiesce in the use of the land, are also sufficient to interrupt the prescriptive period

Id. at 52, 610 S.E.2d at 481 (emphasis added). Based upon this reasoning, the Supreme Court concluded that Respondent's actions in erecting barriers "caused Petitioner to discontinue use of the land, albeit briefly, and were certainly sufficient to leave Petitioner with the impression that Respondent did not acquiesce in the use of his land." *Id.* at 52, 610 S.E.2d 481-82. Thus, the Supreme Court ruled that the Petitioner failed to establish an easement by prescription. *Id.*

Here, like the Respondent in *Pittman*, Defendant's predecessors erected barriers intended to keep others from using the disputed portion of the road. Defendant and her predecessors in title also posted signs indicating that the owners of the property did not acquiesce to unauthorized use of the road and routinely conducted "lock cleanings" to prevent unauthorized use of the road. Any use of the road behind the locked gate was permissive use. These facts are not in dispute. The Defendant's overt acts, along with her predecessors in title, were sufficient to interrupt the prescriptive period. Requiring a servient landowner to take actions in addition to erecting barriers like fences and cables, would encourage wrongful or potentially violent behavior that is contrary to sound public policy considerations and the peaceful resolution of disputes. *See id.* at 52, 610 S.E.2d at 481. The court erred in finding that the Plaintiff proved the first element necessary in establishing an easement by prescription, the continued and uninterrupted use or enjoyment of a right for a full period of twenty (20) years. To hold otherwise would require landowners to guard the entrances to their property with guards and/or guard shacks.

It has long been held that "permissive use of property cannot ripen into an easement by prescription." *Bundy v. Shirley*, 412 S.C. 292, 308 772 S.E.2d 163, 172 (2015) (citing *Williamson v. Abbott*, 107 S.C. 397, 93 S.E. 15 (1917)). This established principle precludes Plaintiff from

establishing an easement by prescription across Defendant's property. Although the court attempted distinguish *Bundy* from the present case, *Bundy v. Shirley* is controlling. See *Bundy v. Shirley*, 412 S.C. 292, 772 S.E.2d 163 (2015). In *Bundy*, the claimant alleged that he had a prescriptive easement over a road located on an adjacent property owner's land. *Id.* at 297-98. The claimant had used the road at issue for 19 years before the property on which the gate was located was sold to a new owner. *Id.* Prior to the sale, the land was leased to the South Carolina Department of Natural Resources as a Wildlife Management Area. *Id.* During that time, a cable gate was located on the road; however, the claimant obtained a key from the game warden allowing him to pass through the gate. *Id.* After the sale, a new gate was erected across the road. The claimant obtained a key to the new gate from the property owner which allowed him to continue to enter and exit through the gate. *Id.* Following a dispute between the two, the property owner prohibited the claimant from using the road. *Id.* The property owner then filed a declaratory judgment action seeking a determination of whether claimant had a prescriptive easement over the disputed road. *Id.*

The Supreme Court held that the claimant's claim of a prescriptive easement was defeated because the claimant's use of the road was always permissive. *Id.* at 311-312, 772 S.E.2d at 173-74; see also *Paine Gayle Properties, LLC v. CSX Transp., Inc.*, 400 S.C. 568, 584, 735 S.E.2d 528, 537 (2012). Thus, the claimant could not establish an easement by prescription. *Id.* The Court should have reached the same conclusion in this matter. **It is undisputed that a locked gate was erected across the road in 1970.** "Although the presence of a locked gate [is] not dispositive of permissive use, it is strong evidence of permissive use of the road." *Id.* at 311. Here, despite the presence of a locked gate, the Court declined to find that the Plaintiff's and its predecessors' use of the road was permissive. This was error. The testimony given by every witness demonstrates

that people who went through the gate either obtained permission from the Defendant or her predecessors or from someone who had been given permission to use the road by the Defendant or her predecessors.³ The record is devoid of testimony where a person seeking to use the road did so without first getting a key or combination to a lock on the gate. There is no testimony indicating that someone unilaterally began using the road behind the locked gate for a twenty-year period without first obtaining someone's permission OR being granted by permission by the locks remaining on the gate. That is, no one encountered the locked gate, cut a link of the chain, placed their own lock on the gate and used the road in that manner for a period of twenty years. While there were unknown locks that would appear from time to time on the gate, the unknown locks were removed during the lock cleanings. The fact that certain people who used the road obtained permission from someone other than a member of the Martin family does not mean that their use of the road was not permissive. Those persons obtaining permission from someone who had been given permission by the Martin family is still permissive use.

The Court distinguished *Bundy* from the present case on the following bases:

- (1) "The Plaintiff had nothing to do with the construction or maintenance of the gate across the disputed roadway";
- (2) "The Defendant's property has never been leased to the state for use by the public";
- and
- (3) "The Plaintiff has never obtained a key from the Defendant or any lessee of the Defendant."

³ The following witnesses testified that they had permission from someone or either obtained a key allowing them to use the road.: Cecil Brazzel (Trial Trans.; 94:3-6); Harold Pickrell (Trial Trans.; 122:23-25); Mack Brazell (Trial Trans.; 141:19-23); Ben Higgins (Trial Trans.; 181:7-12); William Kirkland (Trial Trans.; 193:7-9); Timothy Dargan (Trial Trans.; 211:11-13); Angus Lafaye (Trial Trans.; 229:3-230:3); Gordan Baker (Trial Trans.; 236:9-10; 239:25-240:8); William (Cate Trial Trans.; 245:9-14).

The Plaintiff not having been involved with the construction of the gate is immaterial. The Court provided no explanation as to why this is a relevant factor. Regardless of who erected the gate, the fact remains that the gate prevented unauthorized use of the road across the Defendant's property. Notably, the Plaintiff's member admitted that he asked for a key to the gate, effectively recognizing that the Plaintiff had no rights in the private dirt road. People who went through the gate either obtained permission from the Defendant or her predecessors or from someone who had been given permission to use the road by the Defendant or her predecessor in interest. Again, there is no testimony indicating that an unauthorized user of the road placed their own lock on the gate without permission from another and used the road for twenty years. This would have been impossible as the testimony clearly indicates that periodic "lock cleanings" took place between 1970 and 2009.⁴ Each time a time cleaning took place and an unauthorized lock was removed, the period for a prescriptive easement started anew. *See Pittman*, 363 S.C. at 52, 610 S.E.2d at 481 ("[A]ctions are sufficient to interrupt the prescriptive period when the servient landowner engages in overt acts, such as erecting physical barriers, which cause a discontinuance of the dominant landowner's use of the land, *no matter how brief.*") (emphasis added). Without question, the cutting and removal of a lock from the gate, thereby preventing that user from entering qualifies as an "overt act" which interrupts the prescriptive period. Moreover, the Defendant and her predecessors leaving certain locks on the gate during the lock cleanings is clear evidence of permissive use. Without permission, the locks would have been removed. Defendant and her predecessors could have easily removed all locks when performing lock cleanings but did not do so – instead, they left locks on the gate that they had given permission to be on the gate. By leaving certain locks on the gate, the Defendant and her predecessors, at a minimum, impliedly gave

⁴ The Court found "lock cleanings" occurred "continually during the 1970s, 1980s, 1990s and 2000s". During a "lock cleaning", Defendant or her predecessors would remove all unauthorized locks from the gate.

permission to those persons to continue using the road. Those persons are thereby precluded from establishing a prescriptive easement. *See Bundy*, 412 S.C. at 309, 772 S.E.2d at 172 (“[U]se by express **or implied permission** or license, no matter how long continued, cannot ripen into an easement by prescription.”). (Emphasis added by Defendant)

The second factor provided by the Court is in direct conflict with the Court’s ruling that the private dirt road is a public road. If the disputed private dirt road was in fact a public road, any use of the road would have been permissive. On one hand, the Court states that the Plaintiff and its representatives use of the disputed road was adverse. On the other, it claims that the disputed road has been a public road since 1939. As discussed above, the Court should not find that the use of the road was adverse if it is a public road. As for the third reason provided, while there is no testimony indicating that the Plaintiff obtained a key to the gate from the Defendant, the Plaintiff has not used the disputed road for a period of twenty years. Thus, whether Plaintiff obtained a key is wholly irrelevant. Even assuming that the Plaintiff or its representatives use of the road was adverse, there is no question that it has not used the road for a period of twenty years. As for the other users of the road, there is ample testimony that those persons used the road assuming that they had permission to do so. All use of the road after the gate was erected was under either express or implied permission. Thus, *Bundy* precludes a finding that Plaintiff established an easement by prescription.

As an aside, South Carolina courts have defined adverse use as “use without license or permission.” *Simmons*, 2016 S.C. Lexis 325, *10 (citing *Black’s Law Dictionary* 1681 (9th ed. 2009)). If, as the Court found, the disputed road was a public road, the public would have permission to use the road. The general public’s right to use a road is what differentiates a public road from a private road. The use of a public road cannot be adverse. Thus, if the road was a

public road, the Plaintiff could not obtain an easement by prescription. *See* 2 Am. Jur. *Proof of Facts* 3d 197 § 6, at 218 (1988) (“Any use of property which is not hostile or adverse to the interest or title of the property owner cannot ripen into a prescriptive right.”). *See Also Davis v. Monteith*, 289 S.C. 176, 179-80, 345 S.E.2d 724, 726 (1986) (“[A]dverse possession does not run against the State or its duly constituted political subdivisions.”); *see also Bundy v. Shirley*, 412 S.C. 292, 304 772 S.E.2d 163, 170 (2015) (“Our state decisions on adverse possession are instructive because ‘the right to an easement by prescription is substantially the same in quality and characteristics as that required to acquire title by adverse possession.’”) (quoting 25 Am. Jur.2d *Easements & Licenses* § 39 (2014)). It was clear error for the Court to find that the disputed road was public and that Plaintiff acquired a prescriptive easement over the road. If the road was public, there can be no adverse use. Thus, Plaintiff could not have acquired a prescriptive easement. Notably, the private dirt road at issue in this case is located entirely in Richland County. Richland County’s representative testified at trial that the dirt road at issue in this case is, and at all times has been, a private dirt road.⁵ The dirt road on the Defendant’s property is a private dirt road, not a public road and there is no easement on the property.

B. There is no Easement by Grant.

Although the Plaintiff’s own experts testified that there was no deeded easement over the Defendant’s property, the Court found that the Plaintiff established an easement by grant. “A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments.” *Binkley v. Rabon Creek Watershed Conservation Dist.*, 348 S.C. 58, 71 558 S.E.2d 902, 909 (Ct. App. 2001). “To afford notice of a provision in a recorded instrument, the language must be so intelligible and significant that it would naturally raise a well-grounded suspicion in

⁵ See Trial Exhibit, Defendant’s 9. The private dirt road is noted as a private road in the County’s records.

the mind of a reasonably prudent person, or a person of ordinary diligence and understanding sufficient to suggest an inquiry that would lead to a knowledge of the facts.” *Id.* “A description of an easement in a recorded document it is sufficient when it contains language that acts as a guide to the location of the easement on the land such that the easement is ‘capable of being rendered to a certainty by reference to something extrinsic to which it refers.’” *Id.* (citing *Allen v. Duvall*, 311 N.C. 245, 316 S.E.2d 267, 270 (N.C. 1984)).

Both of the expert witnesses who testified in this matter stated that they were unable to find a deeded easement or a reserved right-of-way across the Defendant’s property. *See* Trial Trans., 77:7-78:22; 301:10-23. Anna Williams, a title abstractor, testified that her search of both the Plaintiff’s and Defendant’s chain of title revealed no reserved right-of-way across the Defendant’s property. *See* Trial Trans., 77:7-78:22. Ms. Williams was specifically questioned on what the Court’s order refers to as “Tract D”. *Id.* The Court found that in a 1918 deed, a twenty (20) foot easement was reserved over through Tract D. This is in direct conflict with Ms. Williams’ testimony which provides:

Q: So, in tract D there is no reservation of any type of right-of-way?

A: No, sir.

Id. at 77:14-16. Ms. Williams also testified that while a deed in the Plaintiff’s chain of title may reference an easement or right-of-way, there was no way to determine the specific location of the alleged right-of-way. *Id.* at 78:16-22. Ms. Williams’ testimony coincides with the testimony of Michael Mills, a surveyor who surveyed the Plaintiff’s property. Like Ms. Williams, Mr. Mills testified that there was no recorded easement across the Defendant’s property. *See* Trial Trans., 301:10-23. Despite this testimony, the Court found that the Plaintiff established a twenty (20) foot easement by grant over the Defendant’s. Even if there was at one time an easement across

Defendant's property, something the Defendant denies, there is no evidence which indicates the easement alleged by the Plaintiff is the easement referenced in the deeds relied on by the Plaintiff. Here, any alleged easement does not contain "...language that acts as a guide to the location of the easement on the land such that the easement is 'capable of being rendered to a certainty by reference to something extrinsic to which it refers.'" *Rabon Creek Watershed Conservation Dist.*, 348 S.C. at 71 558 S.E.2d at 909. Therefore, the Court erred in finding the Plaintiff established an easement by grant.

II. The Court Erred in Finding That Plaintiff's Claims Were Brought Within the Applicable Statute of Limitations

The Court, with little explanation, determined that Plaintiff's claims were brought within the applicable Statute of Limitations. This was error. There is no dispute that a gate, a locked gate, obstructing use of the disputed road was erected in 1970. The statute of limitations begins to run at the time the cause of action accrues. *Harvey v. S.C. Dep't. of Corr.*, 338 S.C. 500, 508, 527 S.E.2d 765, 769 (Ct. App. 2000). "[A] particular cause of action accrues at the moment when the plaintiff has a legal right to sue on it." *King v. James*, 388 S.C. 16, 25-26, 694 S.E.2d 35, 40 (Ct. App. 2010). "An assignee may not maintain a claim if a statute of limitations defense would have been effective if the same claim had been brought by the assignor. Thus, if a claim was barred by the statute of limitations at the time of the assignment, the assignee may not assert the claim. A subrogee of a time-barred claim is similarly barred." 54 C.J.S. Limitations of Actions § 40.

"Statutes of limitations are not simply technicalities." *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). "One purpose of a statute of limitations is 'to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights.'" *Id.* (quoting *McKinney v. CSX Transp., Inc.*, 298 S.C. 47, 49-50, 378 S.E.2d 69, 70 (Ct. App. 1989)); see also *Transp. Ins. Co. & Flagstar Corp. v. S. Carolina Second Injury Fund*, 389 S.C. 422, 428, 699

S.E.2d 687, 690 (2010); *Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 618, 698 S.E.2d 879, 883 (Ct. App. 2010).

The Court correctly determined that the Statute of Limitations governing the obstruction of an easement is ten (10) years. *See Bowen v. Team*, 6 Rich. 298, 40 S.C.L. 298 (1853); *see also* S.C. Code § 15-3-340. However, the Court failed to specify when the statute of limitations began to run. Assuming, *arguendo*, that the Plaintiff did have an easement by grant over the land of the Defendant, something the Defendant denies, the statute of limitations should have started running in 1970 when the gate across the disputed road was erected. Again, the statute of limitations begins to run at the time the cause of action accrues. *Harvey*, 338 S.C. at 508. Even if the Plaintiff's predecessors in interest did in fact have an easement by grant across Defendant's property, which is disputed, the Plaintiff's predecessors in interest had a viable claim for obstruction of the easement the day the gate was erected. As such, the statute of limitations began to run in 1970 and expired in 1980. *See King*, 388 S.C. at 25-26. Therefore, Plaintiff's claims are barred pursuant to S.C. Code § 15-3-340.

S.C. Code § 15-3-380 is also applicable to this case. It provides:

No action shall be commenced in any case for the recovery of real property or for any interest therein against a person in possession under claim of title by virtue of a written instrument unless the person claiming, his ancestor or grantor, was actually in the possession of the same or a part thereof within forty years from the commencement of such action. And the possession of a defendant, sole or connected, pursuant to the provisions of this section shall be deemed valid against the world after the lapse of such a period.

This is a statute of limitations upon an action for the recovery of any interest in real property and expressly gives good title if a suit is not commenced within the forty-year period provided. This statute is applicable as the Plaintiff seeks an interest, specifically, an easement, in Defendant's property. Michael Mills, the Plaintiff's own expert, testified that he found no recorded easement

across Defendant's property. *See* Trial Trans., 301:10-23; 315:19-22. The Court acknowledged this in its Order stating that the easement deeds relied on by the Plaintiff as establishing an easement by grant "were greater than sixty years old and therefore outside the scope of a sixty year title search". The deeds relied on by the Plaintiff as establishing an easement are from the 1920s and 1930s. While Defendant disputes that these deeds establish the easement claimed by the Plaintiff, the court ruled these deeds established an easement by grant. Following these deeds, there is no specific reference to the alleged easement nor does the alleged easement identify the purported location(s) of any purported easement. In one instance, the purported easement references "by the lands of Martin" without giving any reference to the location of the easement, effectively giving rise to the question of whether or not the purported easement is even on the land at issue in this civil action.

S.C. Code § 15-3-380 creates a forty-year statute of limitations. Here, Defendant and her predecessors are in possession of the road "under a claim of title by virtue written instrument" because there is no recent recorded document which provides as an easement across Defendant's land. Stated another way, within the normal title search period, there is no document that would put the Defendant on notice that the alleged easement runs across her property. *See* Trial Trans., 301:10-23; 315:19-22. It would be burdensome and likely impossible to require a prospective buyer of property to search an entire chain of title in order to ensure no easements exist. S.C. Code § 15-3-380 is designed to prevent such a requirement. If an easement is omitted from a chain of title for a period of more than forty years and the servient estate possesses the alleged easement under a claim of title, i.e., it acts as if no easement exists, the easement is in effect extinguished. During the forty-year period, the dominant estate may bring an action to enforce the easement. However, if as is the case here, the dominant estate has not been in possession of the alleged

easement for a period of forty-years, an action to recover or enforce the easement is barred by S.C. Code § 15-3-380. The forty year statute of limitations acts an outer limit within which an action can be filed. Under the Court's ruling, any easement contained in a recorded deed, no matter how old, could later be used to establish an easement across another's property. Regardless of whether an alleged easement disappeared from the chain of title for hundreds of years, under the Court's ruling, the easement could be re-established. The reason that a standard title search and the statute of limitations are both forty years is not coincidence. Abstractors perform forty-year title searches because S.C. Code § 15-3-380 bars actions to recover an interest in property based upon recorded documents more than forty-years old. Plaintiff's claims are therefore barred under S. C. Code § 15-3-380.

III. The Court Erred in Finding that the Disputed Road was Public

Dedication requires two elements: (1) the owner must express in a positive and unmistakable manner the intention to dedicate his property to public use, and (2) there must be, within a reasonable amount of time, an express or implied public acceptance of the property offered for dedication. *Horry County v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993); *Helsel v. City of North Myrtle Beach*, 307 S.C. 24, 413 S.E.2d 821 (1992). As dedication is an exceptional mode of passing an interest in land, the standard of proof for a public dedication of a right of way is strict, cogent and convincing evidence. *Mack v. Edens*, 320 S.C. 236, 464 S.E.2d 124 (1995). The record must contain evidence the owner of the property clearly, convincingly, or unequivocally intended to dedicate his property for public use. *Cleland v. Westvaco Corp.*, 314 S.C. 508, 431 S.E.2d 264 (Ct. App. 1993).

In this case, the evidence and testimony fails to establish dedication and it fails to establish acceptance. As for dedication, there is no strict, cogent or convincing evidence that Defendant

either expressly or impliedly dedicated the road to public use. The Court's ruling is based entirely on the fact that the private dirt road at issue in this action was used by people outside of the Martin family. As such, the Defendant and her predecessors dedicated the road for public use. While the Plaintiff did provide testimony indicating use of the road, those who testified as having used the road prior to the erection of the gate in 1970, had some connection with the Defendant or her predecessors. For example, Algie Campbell, Jr. testified to having used the road in the 1940s through 1960s; however, he also testified that he and his father knew the owners of the property at that time. *See* Trial Trans., 130:12-15. Similarly, James Guy II testified as having used the road in the 1940s, 1950s and 1960s; however, his father owned property located at the end of the road. *See* Trial Trans., 146:16-20. In fact, Mr. Guy stills owns the property he referred to as visiting prior to the erection of the gate. *See* Trial Trans., 156:10-11. Ben Higgins also testified to using the road but his family owned property located along the road. *See* Trial Trans., 173:18. Finally, William Kirkland's testimony provides that he used the road prior to the gate being erected when driving Bubba Dunk, a friend and/or employee of Icky Guy, a property owner along the road. Contrary to the Court's finding, the record is wholly devoid of any testimony of the members of "public having no association" with the Plaintiff or Defendant's property having used the road. While the people cited above may have used the road, their use is insufficient to establish that the road was dedicated for public use.

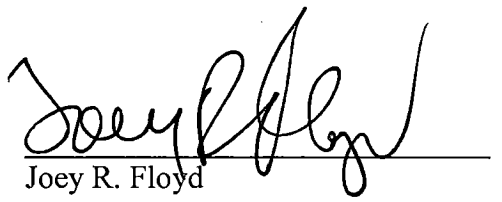
The Court also erred in finding strict, cogent and convincing evidence of acceptance of the road by Richland County. Most notably, Randy Byrd, Richland County's Right of Way Agent, testified that only the first 2900-foot portion of the disputed from Highway 601 is a county maintained road. *See* Trial Exhibit, Defendant's 8. Mr. Byrd expressly stated that the gate on Defendant's property is located beyond the end of the portion of Northeast Shady Grove Road (i.e.

the gate is beyond the terminus of the public road). *See* Trial Trans., 410:11-14; *see also* Trial Exhibit, Defendant's 8 and 9. The County has also placed a sign on the road before it reaches Defendant's property which states that county maintenance ends at that point. *See* Trial Trans., 411:14-18. There can be no more compelling evidence or proof that the road is not public beyond that of the county official charged with maintaining roads stating that this private dirt road is not currently nor has it been maintained by the county. *Id.* This is especially true given that the only evidence offered by the Plaintiff supporting the contention that the road was accepted by the county is testimony of two witnesses stating they saw a motor grader on the road and could not be certain if they were county motor graders. The fact of the matter is that private contractors and individuals maintain their own private dirt roads. Regardless, there is certainly no strict, cogent and convincing evidence to prove that the road is a public road. In fact, to the contrary, there is testimony which suggests that the caretaker of the Guy property may have bribed the county motor grader operator with liquor. *See* Trial Trans., 167:12-20.

IV. The Court Erred in Finding that Defendant Did Not Adversely Possess Any Easement Held by Plaintiff or its Predecessors

Even if this Court were to find that an easement through the Defendant's property existed at one point in time, Defendant and her predecessors have taken ownership of the former easement through adverse possession. As discussed at length above, Defendant and her predecessors have maintained a locked gate across the road for over 40 years. In doing so, the Defendant has established all of the required elements of adverse possession. In South Carolina, the party asserting adverse possession must show continuous, hostile, open, actual, notorious and exclusive possession for at least ten years. *Jones v. Leagan*, 384 S.C. 1, 10, 681 S.E.2d 6, 11 (2009).

“Generally, a claimant’s possession to constitute adverse possession much be such as to indicate his exclusive ownership of the property, and not only must his possession be without subserviency to, or recognition of the title of the true owner, but it must be hostile thereto and to the whole world.” *Gregg v. Moore*, 226 S.C. 366, 370, 85 S.E.2d 279, 281 (1954). The locked gate across the road clearly demonstrates the Defendant’s exclusive and hostile possession of the property. South Carolina courts have repeatedly found that the fencing or gating of property is clear evidence of one exercising dominion and control over the property in a manner that is adverse. *See e.g., King v. Hawkins*, 282 S.C. 508, 511, 319 S.E.2d 361, 362 (1984). Similarly, South Carolina courts have determined that installing fencing and making other improvements to property constitutes open and notorious acts for the purposes of proving adverse possession. *Jones*, 384 S.C. at 14, 681 S.E.2d at 14. In addition to proving hostile, open, actual, notorious and exclusive possession, Defendant can show that these elements have existed continuously for a period greater than ten years because there is ample testimony indicating that the gate was built in 1970. The overwhelming weight of the evidence and testimony establishes that any use of the locked gate was with the permission of Defendant or her predecessors. As such, Defendant and her predecessors have adversely possessed any rights that the Plaintiff or its predecessors may have had in the dirt road.



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January 19, 2017

EXHIBIT A

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Country Properties, LLC,

Plaintiff,

vs.

Nancy Dunn Martin,

Defendant.

BEFORE THE MASTER IN EQUITY

Civil Action No.: 14-CP-40-1805

ORDER**I. INTRODUCTION**

This matter was referred to this Court through a Consent Order, signed by the Honorable L. Casey Manning on July 7, 2014. This action was tried before this Court (non-jury) on March 21-24. Both parties were ably represented by counsel. The Plaintiff, Country Properties, LLC (referred to herein as “the LLC” or “Plaintiff”), was represented by John Wells and the Defendant, Nancy Dunn Martin (referred to herein as “Defendant” or “Nancy Martin”), was represented by Joey R. Floyd and Wesley D. Peel. The Court heard and considered testimony from the witnesses presented, along with the evidence presented by the parties.

The LLC contends that it is entitled to use a dirt road behind a locked gate (locked since 1970) that travels across the middle of Nancy Martin’s property as an additional point of access to its 1,023 acre tract of land. The LLC has access to its property off of two public roads (Highway 601 and Old English Road). Northeast Shady Grove Road is a dirt road in Richland County off of Highway 601 with its terminus 2,914 feet from Highway 601. The terminus of Northeast Shady Grove Road is on Nancy Martin’s Property, where Richland County has placed an “End of County Maintenance” sign. The locked gate is located beyond the terminus of Northeast Shady Grove Road on Nancy Martin’s property.

The LLC seeks a judicial determination that it has an easement through Nancy Martin's property. The LLC filed this action on March 18, 2014, alleging five theories that would allow it to use the dirt road (behind the locked gate) across the middle of Nancy Martin's property: (1) easement by express grant, (2) prescriptive easement, (3) a permanent injunction against Nancy Martin from "blocking or obstructing" Shady Grove Road due to easement by grant, (4) a permanent injunction against Nancy Martin from "blocking or obstructing" Shady Grove Road due to prescriptive easement and (5) that the dirt road through Nancy Martin's property (referred to as "Shady Grove Road" by the LLC) is a public road dedicated to public use. Nancy Martin denied that the LLC had an easement of any type to use the dirt road on her property and denied that the road on her property has been dedicated for public use. Nancy Martin also asserted a number of defenses, including the Statute of Limitations, and filed a counterclaim for adverse possession.

During the trial of this matter, the LLC called the following witnesses:

Anna C. Williams (title searcher)
 Cecil Lavon Brazell
 Harold V. Pickrell III
 Algie Campbell, Jr.
 Lever Mack Brazell
 James Lindsay Guy, II
 Ben Heyward Higgins
 William Duncan Kirkland, Jr.
 Alan Mustard Wooten
 Timothy G. Dargan
 Angus Lafaye
 Gordon H. Baker
 William Cate
 Claude Campbell (by video deposition)
 Arnold Ross Taylor
 Michael Mills (Expert Witness – land surveying)
 James Podell

Nancy Martin called the following witnesses at the trial:

Gary Wessinger
Glen Wessinger
Randy Byrd
Nick Anderson
Mark Paul Kays
Nancy Martin

Having heard the testimony and considered the evidence presented at the trial, the credibility of the witnesses, the legal arguments offered by the parties, and based upon the preponderance or greater weight of the evidence, this Court makes the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACTS

The Parties and the Location of the Dispute

1. The LLC owns 1,023.07 acres, partly in Richland County (383.67 acres) and partly in Kershaw County (640.07 acres).
2. Raglins Creek, which runs through the LLC's property, is the border between Richland County and Kershaw County.
3. The LLC purchased the 1,023.07 acre tract in 2009 from Pine Ridge Investments, LLC ("Pine Ridge Investments").
4. Nancy Martin owns approximately 276 acres on the Southern side of the LLC's property, all of which is located in Richland County. The LLC and Nancy Martin share a common boundary line.
5. The dirt road at issue in this case is located in Richland County.
6. Nancy Martin inherited a certain portion of her property (210.5 acres) from her father, Edward Frank Martin, Jr., in 2007 and Nancy Martin purchased a triangular shaped parcel of land (64.68 acres) in 2012 from Laura Jane Lewis Allen, and others.

(Plaintiff's Exhibits 21 and 31)

7. The Defendant's property, i.e. the property owned by Nancy Martin, all of which is located in Richland County will be referred to herein as "the Martin property" or "the Defendant's property."
8. Nancy Martin's grandfather, Edward Frank Martin, died in 1967, leaving the 210.5 acres, approximate, to Jessie Dunn Martin, in a life estate, with the remainder interest being left to Jessie Martin Pratt, Edward Frank Martin, Jr. and Naomi Jackson Pratt.
9. Edward Frank Martin, Jr. owned a remainder interest in the property in 1970 and his mother, Jesse Dunn Martin, was the owner of a Life Estate in the property.
10. Edward Frank Martin, Jr., the Defendant's father, was the caretaker of this property for Jessie Dunn Martin and he had the right to control the property. (Tr. 477, lines 7-12)
11. The Defendant's grandmother, Jessie Dunn Martin, passed away in 1985 and her father, Edward Frank Martin, Jr. took full ownership of the property in 1990.
(Plaintiff's Exhibit 26)
12. Plaintiff's Exhibit 2 is a plat filed with the Richland County Register of Deeds in 2004. The plat, as discussed in more detail herein, provides this Court with a good orientation of the current location of the LLC's property, the Defendant's property and the location of the locked gate, even though the plat was prepared in 2004. The plat was prepared approximately five years before the LLC purchased the 1023 acre tract of land that shares a boundary with the Defendant's property.

Installation and Location of the Gate

13. The Dunn's Mountain Hunting Club ("DMHC") was started in 1970 by Gary

Wessinger and several other persons to hunt the property that is now owned by the Defendant. (Tr. 367-8, lines 14-7)

14. Gary Wessinger testified that a locked gate (referred to herein as "the gate") was placed across the dirt road in 1970. (Tr. 372, lines 19 – 22)
15. According to Gary Wessinger, the gate was installed by DMHC to prevent people from doing "devilment" and Edward Frank Martin Jr. was concerned that somebody was going to start a fire on his property. (Tr. 372-3, lines 24-8)
16. James L. Guy II testified that he was sure the gate was there by 1970. (Tr. 166, lines 2-20 and Tr. 492, lines 20-22) Mr. Guy owns property in close proximity to the dirt road at issue in this case.
17. Nancy Martin also testified that the gate was installed in 1970 because she recalled riding a motorcycle on the property when she was 10 years old (1970). (Tr. 456, lines 13-22 and Tr. 462, lines 2-5)
18. Mr. Wessinger believed that the gate was moved in 1982 or 1983 to its current location. (Tr. 372, lines 19-20) Notwithstanding that fact, a locked gate has been across the dirt road since 1970.
19. DMHC leased the property now owned by Nancy Martin from 1970 – 2013. (Tr. 474-5, lines 20-18)
20. As part of its lease, DMHC maintained all of the dirt roads on the Martin Property. The maintenance included scraping the roads with a motor grader, repairing holes, and removing trees from the roads. All of the roads on the Martin Property are dirt roads. (Tr. 373-4, lines 13-3)
21. When Edward Frank Martin, Jr. was in control of the property and when Nancy

- Martin was in control of the property, you had to have permission to use the road beyond the locked gate. (Tr. 376, lines 17)
22. The gate had a chain with multiple locks on the chain. In order to keep a lock on the chain, one would be required to obtain the permission of Edward Frank Martin, Jr. (Tr. 380, lines 3-5)
23. If someone asked DMHC to use the dirt road beyond the locked gate, DMHC would give the requestor Edward Frank Martin, Jr.'s phone number. (Tr. 376, lines 18-21)
24. DMHC did not hand out keys. (Tr. 376, lines 22-23)
25. DMHC would report unauthorized use of the road to Edward Frank Martin, Jr. (Tr. 378, lines 19-24)
26. This sort of gate, with multiple locks, is typical. (Tr. 224, lines 16-24)
27. Gary Wessinger recalled that Edward Frank Martin, Jr. authorized the following persons to use the road: DMHC, a fellow by the name of Guy, and his son (James Lindsay Guy II), Rufus Lewis, Mr. Higgins and one other gentleman whose name he could not recall. (Tr. 375-6, lines 24-6; Tr. 390, lines 6-8 and Tr. 403, lines 1-7)
28. Gary Wessinger also testified that Mr. Martin allowed loggers who logged the 1000 acre tract to use the dirt road from time to time – Mr. Martin gave the loggers permission to use the dirt road. (Tr. 377, lines 3-13 and Tr. 378, lines 10-24)
29. Over the years between 1970 and 2007 (during Edward Frank Martin, Jr.'s tenure as the owner and/or manager of the property), DMHC and Edward Frank Martin, Jr. would do periodic "lock cleanings" to get rid of the unauthorized locks on the chain. (Tr. 381-3, lines 17-10)
30. In conjunction with the lock cleanings, DMHC would post a sign, similar to

Defendant's Exhibit 12, which states:

IN 15 DAYS, FROM THE ABOVE-DATE, ALL LOCKS THAT ARE NOT AUTHORIZED BY LAND OWNER E.F. MARTIN, JR., WILL BE REMOVED FROM THIS GATE. LOCKS WILL BE FASTENED BY WIRE TO GATE SO THAT YOU CAN RECLAIM YOUR LOCK.

THIS LAND IS LEASED TO DUNN MOUNTAIN HUNT CLUB AND THE ROAD IS MAINTAINED BY THEM.

ANY QUESTIONS CAN BE DIRECTED TO E.F. MARTIN, JR.

AT: OFFICE # 803 779-4937.

31. Mr. Wessinger recalled doing a lock cleaning about six or eight times over the years (Tr. 383, lines 7-12)
32. Mr. Wessinger testified that nobody ever responded to the notice (Tr. 392, lines 5-7) and nobody ever claimed a lock. (Tr. 383-4, lines 23-5)
33. There were also multiple times where DMHC just snipped off a lock or two if the lock(s) were unauthorized. (Tr. 383, lines 14-16)
34. Glenn Wessinger (son of Gary Wessinger) also testified that he believed DMHC did the best it could to police the gate by taking off locks that did not belong on the gate. (Tr. 399-400, lines 23-2)

Testimony from Richland County and Kershaw County Employees

35. Randy Byrd, the Richland County Right of Way Agent, testified that Northeast Shady Grove Road is a public road for 2914 feet from Highway 601. (Tr. 413, 5-23 and Tr.427, lines14-17)
36. The gate across the dirt road on the Defendant's property is located beyond the End of County Maintenance on Northeast Shady Grove Road. (Plaintiff's Exhibit 22)
37. Richland County deems the road beyond the End of County Maintenance, 2914 feet

from Highway 601, as being a private road. (Tr. 415, lines 18-20 and Defendant's Exhibit 9)

38. Mr. Byrd was not familiar with Richland County performing any maintenance on the dirt road behind the locked gate on Nancy Martin's property. (Tr. 415-416, lines 25-9)

39. Defendant's Exhibit 9, a map prepared by Richland County, clearly illustrates the public portion of Northeast Shady Grove Road and the private portion of the dirt road that extends beyond the terminus of the public road.

40. Mr. Byrd also testified that the public portion, i.e. to the end of county maintenance sign, of Northeast Shady Grove Road is public by way of a prescriptive easement. (Tr. 417-18, lines 12-2)

41. Nancy Martin also called Nick Anderson, Director of Public Works Department and Solid Waste for Kershaw County, as a witness. Mr. Anderson testified that Kershaw County had not performed any maintenance on dirt roads in Richland County. (Tr. 441, lines 19-22)

Current Ownership of the Plaintiff's Property

42. Jim Podell and Claude Campbell were the members of Country Properties at the time of the purchase. Sometime after the sale, Campbell sold his interest in Country Properties to Jim Podell's wife, Dorothy Podell. Claude Campbell died prior to the trial of this matter and Mr. Campbell's testimony was entered at the trial of this matter through the replay of a video deposition.

43. The LLC has multiple points of access to its property, all of which can be used to access all parts of the LLC's property. (Tr. 336-8, lines 24-10)

Testimony of the Plaintiff's Title Searcher, Anna Williams

44. The first witness called by the LLC was a title searcher, Anna Williams, in an effort to establish the chains of title to the various properties at issue in this case. Ms. Williams testified that she had been a title searcher for thirty years.
45. The LLC contends that the basis giving rise to a purported easement has its origins in an 1884 partition suit.
46. The 1884 partition suit and accompanying plat does not show a road, of any sort, across any tracts of land. (Plaintiff's Exhibits 18 and 19)
47. The 1884 plat does show various tracts of land identified by letters and numbers.
48. The title searcher testified that the Defendant's property is comprised of Tracts D, E and a portion of C on the 1884 plat (Plaintiff's Exhibit 19). (Tr. 76, lines 16-23)
49. Based on the 1884 plat, Tracts C, D and E total 370.4 acres. There was no clarification or explanation, or attempted overlay, of where the Defendant's property is actually located on the 1884 plat. (Plaintiff's Exhibit 19) This leads to a discrepancy of approximately 100 acres.
50. In fact, the title searcher had no explanation for how, or why, large tracts of land essentially disappeared over time in various chains of title. The title searcher provided no explanation for 108 acres turning into 65 acres (Tr. 75-76, lines 20-6) and other acreage discrepancies. (Tr. 84, lines 4 – 21)
51. The LLC has primarily asserted its claim to an easement through two deeds (CW 121 and ES 127). Notably, the deeds do not reference any plat or map of any kind nor is there any description of where these purported rights of way may lie in connection with the Defendant's property, if they are even on the Defendant's property.

52. Notably, the title searcher unequivocally testified that there was no right of way reserved in the "Tract D" chain of title from the 1884 plat. (Tr. 77, lines 10-16). The title searcher contends that the Defendant's property is a part of Tract D shown on the 1884 plat. If there is no right of way reserved, there can be no easement.

Testimony of the Plaintiff's Expert Witness (Land Surveyor)

53. The LLC called Michael Mills as an expert witness during its case in chief. Michael Mills is a licensed surveyor with approximately 40 years of experience at the time this case was tried.

54. Michael Mills was qualified as an expert in the field of "surveying land." (Tr. 270, lines 8 – 13)

55. Mr. Mills' involvement with the LLC's land stems back to 2004, when he/his company prepared a plat (a Boundary Survey) for Gonzales Land and Timber, LLC, which is referred to herein as "the Gonzales Plat." Gonzales Land and Timber, LLC was the owner of the property when the Gonzales Plat was prepared. The Gonzales Plat is Plaintiff's Exhibit 2.

56. The Gonzales Plat was filed in the Richland County Registered of Deeds at Book/Page: R 951/1618.

57. The Gonzales Plat was prepared when Edward Frank Martin, Jr. and Laura Jane Lewis Allen, and others, owned the tracts of land currently owned by the Defendant.

58. Mr. Mills unequivocally testified that there was no written or recorded easement over the lands of Edward Frank Martin, Jr. and Laura Jane Lewis Allen's land, the land that is now owned by Nancy Martin in this case. (Tr. 301, lines 10-15 and Tr. 301-2, lines 21-2)

59. Mr. Mills was familiar with Santee Cooper placing locks on landowner's gates. (Tr. 303, lines 17-19)
60. Nancy Martin testified that the gate on her property had a Santee Cooper lock that was placed on the gate with the permission of her father. (Tr. 459, lines 13-22)
61. Mr. Mills acknowledged that he had a Santee Cooper key. (Tr. 303, lines 20-22)
62. Mr. Mills did not note or make mention of any right of way or easement of any kind traversing the property that is now owned by Nancy Martin when he prepared the Gonzales Plat in 2004.
63. To the contrary, Mr. Mills noted the presence of a "GATE" on the Gonzales Plat across the dirt road shown on the property that was, at that time, owned by Edward Frank Martin, Jr. (Plaintiff's Exhibit 2)
64. Mr. Mills also showed a "CABLE GATE" across the dirt road at the location where the "DIRT WOODS ROAD" leaves the property owned by Laura Jane Lewis Allen, and others, and enters the property owned by Gonzales Land and Timber, LLC. (Plaintiff's Exhibit 2)
65. There is no mention of an easement or any designation whatsoever on the Gonzales Plat that anyone has a right to use that portion of the road beyond the "GATE" at the end of "Shady Grove Road" on the Gonzales Plat. (Plaintiff's Exhibit 2)
66. Mr. Mills testified that he showed gates if they may be an impediment to the property. (Tr. 299-300, lines 20-3)
67. Interestingly, Mr. Mills did note an easement on the property that is now owned by the LLC. In particular, on the Gonzales Plat, Mr. Mills noted a Right of Way Easement leading from Old English Road to the land owned by Upper English

Swamp, Inc. (Plaintiff's Exhibit 2) This particular right of way shown on the Gonzales Plat does not touch Nancy Martin's property nor does it affect Nancy Martin's property.

68. Somewhat surprisingly, Mr. Mills testified at trial that he had not checked with the County (Richland County) to see how the County identified the road. (Tr. 306, lines 9 – 19)

69. Mr. Mills acknowledged that the purpose of a locked gate is to control entry. (Tr. 308, lines 11-15)

70. Mr. Mills also acknowledged that the 2013 aerial photo shows that there is access from Highway 601 and Old English Road to all points on LLC's Property. (Tr. 312-13, lines 18-9)

71. When asked by this Court about the easement, Mr. Mills said: "We didn't find any recorded easement involving the entirety of the road." (Tr., P 315, lines 5-22)

Testimony by Arnold Ross Taylor

72. The LLC called Arnold Ross Taylor, an employee of the University of South Carolina, who works in the Thomas Cooper Library to testify about certain aerial photographs.

73. Mr. Taylor maintains the aerial photo collection and federal maps at the Thomas Cooper Library. (Tr. 248, lines 23-25)

74. Mr. Taylor provided this Court with testimony and a number of historical aerial photographs.

75. However, Mr. Taylor testified, when asked by the Court, that he had never been to the property that is in dispute in this case (i.e. the dirt road and the locked gate). (Tr. 263,

lines 1-9)

76. While the Court is troubled by the fact that Mr. Taylor never visited the LLC's property (or this property in general), even if this Court were to assume that the photographs are accurate portrayals of the property as they might have existed on the dates shown on the photographs, the photographs do not provide this Court with anything beyond the presence of pathways/possible dirt roads.
77. The aerial photographs do not show fences, gates, obstructions or cars. Perhaps even more important, the aerial photographs do not provide us with any information about who is using the pathways/dirt roads and who has permission to use the pathways/dirt roads. On that same note, the aerial photographs do not provide any information to the Court about adverse or hostile use.
78. In fact, during Mr. Mills' testimony, he acknowledged that the photographs can not tell us who is using the path/dirt road, who had permission nor can the pictures show a gate because of the resolution of the pictures. (Tr. 311 -12, lines 21-7)

Alleged Use of the Dirt Road behind/beyond the Locked Gate

79. The LLC called a number of witnesses to testify about the alleged "use" of the dirt road at issue in this case.
80. The overwhelming majority of the witnesses called by the LLC who testified had permission, of some sort, or were operating under the belief that they had permission to use the dirt road on the Defendant's property beyond the locked gate.
81. The "use witnesses" called by the LLC did not (and could not) say that they used the road in an adverse manner. To the contrary, the "use witnesses" were locked out by the gate and they had to find a way to get access through a locked gate. Some of the

use witnesses procured a combination to a lock, some procured a key and some of the witnesses had their own key to a Santee Cooper lock on the locked gate that was on the gate with the consent of the Nancy Martin's father and Nancy Martin.

82. Notably, none of the principals of the prior owners of the LLC's property (with the exception of the LLC) appeared and testified about the "use" of the dirt road at issue in this case.

83. The LLC called the following "use" witnesses:

- a. Cecil Brazzell, the brother of the principal in Pine Ridge Investments, LLC, testified that he obtained a key to the locked gate across the dirt road on Defendant's property to gain access through the locked gate. (Tr. 94, 3-6) Mr. Brazzell obtained permission from his brother to use the locked gate on the Defendant's property.
- b. Harold Pickerel also testified that he obtained permission from someone to use the dirt road on the Defendant's property. (Tr. 122, lines 19-25) Notably, Mr. Pickerel could only remember one gate between Highway 601 and the LLC's property. (Tr. 116, lines 9-12) But, Mr. Pickerel's memory of a single gate could be attributable to the fact that Mr. Pickerel may have only visited the property on Saturdays when people were hunting the property and the gates were open for hunting on Saturdays. Regardless, Mr. Pickrel had procured the permission of someone to use the dirt road because he had a key to the locked gate.
- c. Algie Campbell testified that he used to use the dirt road before 1960 to fish and hunt. (Tr. 130, 16-24) Mr. Campbell also said that there was no trespassing – the owners knew he was back there using it and they did not mind. (Tr. 130-1, lines

- 21-6) Mr. Campbell was operating under permission to use the dirt road.
- d. Mack Brazzell testified that the gate was locked and they had a combination to unlock the gate. (Tr. 136, lines 1 -21) Again, Mr. Brazzell had obtained permission (i.e. the combination) from someone to use a combination lock on the gate.
 - e. James Lindsay Guy II testified that he doesn't know how his father came to have a lock on the gate. Instead, his father gave him a key to use. (Tr. 166-7, lines 21-4) Mr. Guy had been given permission from his father to use the dirt road.
 - f. Ben Higgins testified that the Wessingers installed a pole gate on the dirt road in the mid 70s. He had moved away from the area at the time, but he would visit his parents. (Tr. 180, lines 1-3) Mr. Higgins also testified that he borrowed a key from the Wessingers to get some rocks off of an old house place – that he had obtained permission to use the dirt road. (Tr. 180-1, lines 17-9) Mr. Higgins had been given permission from the Wessingers to use the dirt road.
 - g. William Duncan Kirkland, Jr. testified that when he was nine or ten years old, in 1954, he would ride with his father's uncle on the property. (Tr. 188, lines 3-10) Everybody knew his father's uncle and it was fine for his father's uncle to go wherever he wanted to go. (Tr. 193, lines 19-21). Mr. Kirkland, with his father's uncle, had permission to use all of the roads in the area. Notably, the last time Mr. Kirkland recalls visiting this area before 2016 was 1961. (Tr. 196, lines 20-23)
 - h. Alan Wooten testified that he has known Jamie Guy all of his life. (Tr. 198, lines 19-22). He had a key to the locked gate so he did not have to ask permission (Tr.

203, lines 6-12). Again, Mr. Wooten had permission to use the locked gate because he was given a key by Mr. Guy.

- i. Timothy Dargan was a forester for a prior owner of the LLC's property. Mr. Dargan prepared a timber map that does not show the gate on Defendant's property. (Plaintiff's Exhibit 38) Mr. Dargan could not recall if there was a gate between 601 and what is now the LLC's property. (Tr. 212-213, lines 25-6) Mr. Dargan specifically said that they would not have installed combination locks on any gate without permission from somebody. (Tr. 215, lines 16-23)
- j. Angus Lafaye, another forester, testified that he had used the dirt road across the Defendant's property. Notably, Mr. Lafaye did not access the property from 1969 – 2000. (Tr. 226, lines 18-24) While Mr. Lafaye says he did not “ask permission” to use the road, he had been granted permission by the Dick Lloyd Trust to get to the Lloyd Trust property (now owned by the LLC). (Tr. 230, lines 25-3) Notably, Mr. Lafaye also had a Santee Cooper key, which would have enabled him to use Santee Cooper's lock on the Defendant's gate. (Tr. 231-2, lines 12-18) Mr. Lafaye had been given permission to access what is now the LLC's property.
- k. Gordon Baker, another forester, was called by the LLC. Mr. Baker testified that he had been given access at some point to the gate and he installed his own lock on the gate. (Tr. 236, lines 4-10) He assumed he had permission to put his lock on the gate. (Tr. 239-40, lines 25-3)
- l. Billy Cate, a real estate agent for Milliken Forestry, testified that when he was involved in the sale of the property he was told that he had permission to use the dirt road on Defendant's property (Tr. 245, lines 9-14)

84. The LLC's own representative, James Podell, used the dirt road by procuring the combination of a lock from Harold Pickerel (Tr. 323, lines 14-17)
85. Mr. Podell himself acknowledged that permission was necessary to use the dirt road on Nancy Martin's property because he asked the DMHC for a key to the locked gate. (Tr. 345-6, lines 21-10)
86. When Mr. Podell was denied a key to the locked gate, he actually cut the chain on the gate, twice, and placed his own lock on the chain, both of which were ultimately removed. (Tr. 346-7, lines 20-2)
87. Mr. Podell and nearly all of the other witnesses called by the LLC testified that gates are designed to keep people out of the property. (James Podell – Tr. 338, lines 11-13; Carl Brazell – Tr. 98, lines 13-15; Harold Pickrell – Tr. 123, lines 10-15; Mack Brazzell – Tr. 141, lines 13-18; James Lindsay Guy, II – Tr. 167, lines 8-11; Alan Wooten – Tr. 203, lines 12 – 13; Angus Lafaye – Tr. 227, lines 18-24; Gordon Baker – Tr. 239, lines 23-24; Claude Campbell Dep. 41, lines 15-19)
88. Mr. Podell acknowledged that he knew that there was a locked gate on someone else's property that separated his property from 601 when he first looked at the property. (Tr. 343, lines 6-16)
89. Claude Campbell, a former member of the LLC, got through the locked gate by using a combination lock. (Campbell Dep. 8, lines 13-16)
90. Mr. Campbell testified that he went through the gate 4 – 6 times and the gate was locked every time he went through the gate. (Campbell Dep. 24, lines 19-25 and Campbell Dep. 25, lines 1-2)
91. Mr. Podell also acknowledged that he saw the end of county maintenance sign. (Tr.

344, lines 2-11)

Miscellaneous Facts

92. The only thing that Mr. Podell reviewed before closing was the Gonzales Plat and he acknowledges that the Gonzales Plat does not have a single word on it that indicates anyone has a right to use the dirt road on the Defendant's property. (Tr. 345, lines 12-16)
93. After the LLC purchased the property, the LLC spent \$70,000.00 in upgrades to the pond dam. After the repairs were completed, the dam was eighteen feet wide and Mr. Podell was able to drive a bulldozer across the dam. (Tr. 352, lines 1-18)
94. The LLC repaired the dam so that timber could be harvested and log trucks could go across the dam. (Campbell Dep. 34, lines 8-18)
95. Mr. Podell also testified that he made an offer to purchase the triangular tract of property (approximately 65 acres), now owned by the Defendant, before Nancy Martin purchased the tract. The offer was conditioned upon the owners of the property clearing up the access issue through the locked gate on the Defendant's property. (Tr. 352-3, lines 19-17)
96. Mr. Podell procured an address from Richland County but he did not tell the Richland County employee that there were two locked gates separating the public road from the property he was seeking to have addressed nor did Mr. Podell tell the Richland County employee anything about this litigation. (Tr. 355-6, lines 3-2)
97. Mr. Podell testified at trial that he believed his property to be worth about the same amount of money that he paid for the property, \$2,014,000.00. (Tr. 362, lines 14-24)

III. CONCLUSIONS OF LAW

A. Deeded Right of Access

The LLC claims an express easement in its chain of title was granted in the Defendant's chain of title. The Plaintiff's own witnesses (Anna Williams – Title Searcher and Michael Mills – Land Surveyor) both testified unequivocally that there was no recorded easement in the Defendant's chain of title. Notably, Michael Mills was qualified as an expert in surveying land. After carefully reviewing the deeds, plats and listening to the testimony of the witnesses at the trial of this matter, I conclude that there is no deeded right of access or express easement to the Plaintiff in the Defendant's chain of title. Even if this Court were to find the existence of an express easement, the Defendant's actions and her predecessors in title, have, over the 44 years before this lawsuit was filed (1970-2014), extinguished any purported rights and/or easement through adverse possession.

B. Permanent Prescriptive Easement

A permanent prescriptive easement is not implied by law. *Bundy v. Shirley*, 412 S.C. 292, 304, 772 S.E.2d 163, 169 (2015). It is established by the conduct of the dominant estate. *Id.* Under South Carolina law, to establish a prescriptive easement the party claiming an easement must show, by clear and convincing evidence, (1) continued and uninterrupted use or enjoyment of the right for a period of twenty years; (2) the identity of the thing enjoyed; and (3) use or enjoyment which is either adverse or under a claim of right. *See id.* at 304, 772 S.E.2d at 169-70 (emphasis by Court).

The Plaintiff cannot establish the necessary elements for a prescriptive easement. “[E]vidence of permissive use defeats the establishment of a prescriptive easement because use that is permissive cannot also be adverse or under a claim of right. Stated another way, when a claimant uses property with the permission of the owner, he or she acknowledges the owner's rights and uses the

property without an affirmative, hostile act toward the owner's rights." *Id.* at 310, 772 S.E.2d at 173 (internal citations omitted).

In *Bundy v. Shirley*, a case with facts strikingly similar to this case, our Supreme Court addressed the issue of permissive use as it relates to prescriptive easements. The Court held that the claimant's claim of a prescriptive easement was defeated because the property owner gave the claimant a key to unlock the cable that blocked the road and later gave him permission to construct a gate on the property in the same location as the cable. *See id.* at 311-12, 772 S.E.2d at 173-74. The court, relying on established precedent, found that the claimant's use of the disputed road was entirely permissive. *Id.*, *see also Paine Gayle Properties, LLC v. CSX Transp., Inc.*, 400 S.C. 568, 584, 735 S.E.2d 528, 537 (2012) ("The asking and obtaining of permission....stamps the character of the use as not having been adverse, or under claim of right, and therefore as lacking that essential element which was necessary for it to ripen into a right by prescription."). Only after the property owner revoked the claimant's permission to use the road did the claimant begin to use the disputed road in a manner hostile to the owner's rights. *See id.*

Like *Bundy*, the installation of the gate (in 1970) and blocking access to the Plaintiff's property leads to the conclusion that the Plaintiff's use of the road was by permission, not adverse to the Defendant's rights. Defendant and her predecessor in interest granted permission to others by allowing them to gain access through the use of a key or combination lock on a locked gate. *See Bundy*, 412 S.C. at 311, 772 S.E.2d at 173 (stating the presence of a locked gate is strong evidence of permissive use). The locks that could not be identified, or that belonged to those who used the property without the Martin's express permission, were removed from the gate on at least six different occasions between 1970 and 2014 through a series of "lock cleanings" and other locks were "snipped" off from time to time. There is no evidence that the Plaintiff or its predecessor in interest made any distinct and positive assertion of a right hostile to

the Martins after the gate was erected on the Martin Property, with the single exception of Mr. Podell, the LLC's representative, cutting the chain and inserting his lock (once Mr. Podell was denied access). Moreover, James Podell admitted that he asked DMHC for a key to the locked gate, i.e. Mr. Podell asked for permission to use the locked gate thereby affirming Nancy Martin's superior right. Therefore, LLC's use of the road has never been adverse or under a claim of right. It has always been permissive.

Through the various "use witnesses," the LLC has attempted to demonstrate that the locked gate did not stop people from using the private dirt road. As a preliminary matter, the use witnesses had all obtained permission from one source or another in order to access the private dirt road beyond the locked gate. While the source of the permission may not have been from the owner, the character of use by the use witnesses was always permissive in nature. Notwithstanding that fact, the LLC seems to suggest that if the landowner is unsuccessful in stopping trespassers and/or people that have procured permission, a potential LLC can successfully argue that he/she has met the burden of proof to establish a prescriptive easement. But, the South Carolina Supreme Court has spoken on this issue. In particular, South Carolina's Supreme Court has set forth the following rule:

A landowner . . . is not required to battle successfully for his rights. It is enough if he asserts them to the other party by an overt act, which, if the easement existed, would be a cause of action. Such an assertion interrupts the would-be dominant owner's impression of acquiescence, and the growth in his mind of a fixed association of ideas; or, if the principle of prescription be attributed solely to the acquiescence of the servient owner, it shows that acquiescence was not a fact.

Pittman v. Lowther, 363 S.C. 47, 51-52, 610 S.E.2d 479, 481 citing *Garrett v. Mueller*, 144 Ore. App. 330, 927 P.2d 612 (Or. App. 1996, 927 P.2d at 617 (quoting *Brayden v. New York, H.H. & H.R. Co.*, 172 Mass. 225, 51 N.E. 1081, 1081-82 (1898))).

The South Carolina Supreme Court in *Pittman* went on to say that “[w]e conclude actions are sufficient to interrupt the prescriptive period when the servient landowner engages in overt acts, such as erecting physical barriers, which causes a discontinuance of the dominant landowner’s use of the land, no matter how brief.” *Pittman* at 52. In essence, the LLC would suggest that a landowner must take all actions necessary to successfully block people from using the road – taken to its logical end, perhaps even suggesting that a landowner would be required to post a guard at the locked gate. But, *Pittman* clarified this rule and clearly states that a landowner is not required to successfully keep people out. The landowner is only required to engage in overt acts (erecting physical barriers or threats). As such, the erection of the locked gate in 1970 bars and precludes the LLC from asserting that it has a prescriptive easement because the erection of a locked gate prevents the Plaintiff from establishing the first element of a prescriptive easement, i.e. continued and uninterrupted use or enjoyment of the right for a period of twenty years. As such, the Plaintiff’s claim of a prescriptive easement fails.

C. Dedication of the Road to Public Use

Under certain circumstances, which do not exist here, private property can be dedicated to public use. “Dedication requires two elements. First, the owner must express in a positive and unmistakable manner the intention to dedicate his property to public use. Second, there must be, within a reasonable amount of time, an express or implied public acceptance of the property offered for dedication. *Town of Kingstree v. Chapman*, 405 S.C. 282, 302, 747 S.E.2d 494, 504 (2013). The party claiming the dedication has the burden of establishing dedication and public acceptance. *Id.*

The LLC does not contend that Defendant has made an express dedication. Rather, the LLC claims that the Defendant’s intention to dedicate should be implied from the circumstances.

“Absent an express grant, one who asserts a dedication must demonstrate conduct on the part of the landowner clearly, convincingly, and unequivocally indicating the owner’s intention to create a right in the public to use the property in question adversely to the owner.” *Id.* at 302, S.E.2d at 504. South Carolina courts have recognized two types of implied dedication. *Id.* First, where the question of dedication arises from the sale of land with references to maps or plats. *Id.* Second, when the dedication arises from an abandonment to or acquiescence in public use. *Id.* The LLC argues that the property was dedicated under the second method—abandonment to or acquiescence in public use.

The LLC cannot prove an intention to abandon the roadway in issue or acquiescence to the public’s use of the road. For more than 40 years, Nancy Martin and her predecessors in interest, have taken action to prevent the public use of the road by maintaining a locked gate. The constant presence of the locked gate clearly demonstrates an intention to keep the road under Defendant’s ownership. Any argument stating that use of the road by certain members of the public shows the Defendant’s intention to dedicate the road should be rejected. “The essence of dedication is that it shall be for the use of the **public at large**.” *Id.* at 304, 747 S.E.2d 505 (emphasis added). Nancy Martin and her predecessors in interest allowing certain people to use the road, i.e. giving permission to certain persons, cannot be construed as an intention to dedicate the road to the public at large.

The LLC can not show acceptance of the road. “As with intention to dedicate, no formal acceptance by a public authority is necessary to show public acceptance. Acceptance may be implied by the public or a public authority continuously using or repairing the property. The use, repair, and working of the streets by public authorities is a mode of acceptance.” *Id.* at 303, 747 S.E.2d at 505. Here, Richland County has posted a sign approximately 2914 feet in front of the

locked gate stating that county maintenance ends at that point. The portion of the road in question is not, nor has it in the past, been maintained by Richland County or Kershaw County. The fact that Richland County maintains a portion of the road before the locked gate has no bearing on this case. The only evidence of maintenance of the road is by conjecture and speculation by two witnesses in this case and the greater weight of the evidence is that a caretaker of the Guy property may have given liquor to maintenance personnel to get the road scraped (Tr. 167, lines 12-15) Further supporting that there has been no public acceptance, Richland County's Right of Way Agent, Randy Byrd, testified that the road is a private road. The dirt road at issue on the Defendant's property is located in Richland County. Richland County's records clearly indicate that the County deems the road to be a private road. The LLC has not established dedication and acceptance and the dirt road on the Defendant's property is clearly a private road.

D. Adverse Possession/Prescription by the Servient Tenement

Even if this Court were to find that an easement through Nancy Martin's property existed at one point in time, Nancy Martin and her predecessor's in interest have taken ownership of the former easement through adverse possession. Nancy Martin has asserted a counterclaim for Adverse Possession. As set forth herein, Nancy Martin and her predecessors in interest have maintained a locked gate across the private dirt road in excess of 40 years. As such, Nancy Martin has established all of the required elements of adverse possession. In South Carolina, the party asserting adverse possession must show continuous, hostile, open, actual, notorious and exclusive possession for at least ten years. *Jones v. Leagan*, 384 S.C. 1, 10, 681 S.E.2d 6, 11 (2009).

“Generally, a claimant’s possession to constitute adverse possession must be such as to indicate his exclusive ownership of the property, and not only must his possession be without subserviency to, or recognition of the title of the true owner, but it must be hostile thereto and to the whole world.” *Gregg v. Moore*, 226 S.C. 366, 370, 85 S.E.2d 279, 281 (1954). The locked gate across the private road, located entirely on the Nancy Martin’s property, clearly demonstrates the Defendant’s exclusive and hostile possession of the property. South Carolina courts have repeatedly found that the fencing or gating of property is clear evidence of one exercising dominion and control over the property in a manner that is adverse. *See e.g., King v. Hawkins*, 282 S.C. 508, 511, 319 S.E.2d 361, 362 (1984). Similarly, South Carolina courts have determined that installing fencing and making other improvements to property constitutes open and notorious acts for the purposes of proving adverse possession. *Jones*, 384 S.C. at 14, 681 S.E.2d at 14. In addition to proving hostile, open, actual, notorious and exclusive possession, Nancy Martin can show that these elements have existed continuously for a period greater than ten years because the gate across the road at issue was erected in 1970. The private dirt road has been blocked/obstructed by the locked gate since 1970. The overwhelming weight of the evidence and testimony in this case establishes that any use of the locked gate on the property that is now owned by Nancy Martin was with the permission of Nancy Martin and/or with the Defendant’s predecessor’s in title. As such, Nancy Martin and her predecessors have adversely possessed any rights that the LLC and/or the LLC’s predecessor’s in interest may have had in the private dirt road.

E. Statute of Limitations

The LLC’s claims, if any, are barred by the statute of limitations pursuant to S.C. Code § 15-3-380, S.C. Code § 15-3-360, and S.C. Code § 15-3-340. The statute of limitations begins to

run at the time the cause of action accrues. *Harvey v. S.C. Dep't. of Corr.*, 338 S.C. 500, 508, 527 S.E.2d 765, 769 (Ct. App. 2000) (citing *Matthews v. City of Greenwood*, 305 S.C. 267, 269, 407 S.E.2d 668, 669 (Ct. App. 1991)). “Thus, a particular cause of action accrues at the moment when the plaintiff has a legal right to sue on it.” *King v. James*, 388 S.C. 16, 25-26, 694 S.E.2d 35, 40 (Ct. App. 2010).

“Statutes of limitations are not simply technicalities.” *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). “One purpose of a statute of limitations is ‘to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights.’” *Id.* (quoting *McKinney v. CSX Transp., Inc.*, 298 S.C. 47, 49-50, 378 S.E.2d 69, 70 (Ct. App. 1989)); see also *Transp. Ins. Co. & Flagstar Corp. v. S. Carolina Second Injury Fund*, 389 S.C. 422, 428, 699 S.E.2d 687, 690 (2010); *Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 618, 698 S.E.2d 879, 883 (Ct. App. 2010). The LLC’s claims are barred by three distinct statute of limitations, S.C. Code § 15-3-380, S.C. Code § 15-3-360 and S.C. Code § 15-3-340.

1. S.C. Code § 15-3-380

The LLC is barred from pursuing its claims by virtue of S.C. Code § 15-3-380, which provides as follows:

No action shall be commenced in any case for the recovery of real property or for any interest therein against a person in possession under claim of title by virtue of a written instrument unless the person claiming, his ancestor or grantor, was actually in the possession of the same or a part thereof within forty years from the commencement of such action. And the possession of a defendant, sole or connected, pursuant to the provisions of this section shall be deemed valid against the world after the lapse of such a period.

This statute is a statute of limitations upon an action for the recovery of any interest in real property and expressly gives good title. Of the three limitations statutes that apply, § 15-3-

380 is the most liberal and allows for the longest limitations period, requiring a Plaintiff to commence an action within forty years from the time when its rights were imposed upon or possession becomes “valid against the world.”

Here, Defendant holds legal title to property which the LLC seeks an interest in, i.e. the LLC is seeking an easement over the Martin property. This action was filed by the LLC in 2014; therefore, the operable year for the 40 year statute of limitations is 1974. The 40-year statute of limitations acts as a complete bar to the LLC’s civil action. The locked gate was installed on the dirt road in 1970. In turn, the 40-year statute of limitations began to run when the locked gate was installed across the dirt road. *See Woods v. Bivens*, 292 S.C. 76 (S.C. 1987) citing S.C. Code 15-3-380 as a complete bar to an action seeking a property right.

Any right of action by the LLC and/or its predecessors in title should have been commenced against Defendant and/or Defendant’s predecessor’s in title, on, or before, 2010. The installation of the locked gate in 1970 on the dirt road “started the statute of limitations clock.” LLC filed this action against Nancy Martin on March 18, 2014, some 44 years after the locked gate was installed on the dirt road. Therefore, to the extent that the LLC may have had any rights in the dirt road, Defendant’s possession of the dirt road became valid against the world in 2010 *at the latest*, and the LLC’s causes of action must be dismissed as a matter of law.

2. S.C. Code § 15-3-360

The LLC is also barred from pursuing its claims pursuant to S.C. Code § 15-3-360, which provides as follows:

No entry upon real estate shall be deemed sufficient or valid as a claim unless an action be commenced thereupon **within one year after the making of such entry and within ten years from the time when the right to make such entry descended or accrued.**

The LLC commenced this action on March 18, 2014. Therefore, under S.C. Code §

15-3-360, the LLC's action may only be maintained if it (1) accessed the dirt road as a matter of right on or after March 18, 2013 and (2) was possessed of the right to access Northeast Shady Grove Road on the LLC's property within ten years of March 18, 2014 (on or after March 18, 2004).

The last time Mr. Podell and Mr. Campbell accessed Northeast Shady Grove Road through the Martin's property was before their lock was removed in 2009. Setting aside the fact that access was not as a matter of right because the LLC's use was permissive, at the latest, the LLC should have filed its lawsuit on or before 2010 to satisfy the first requirement of § 15-3-360. And even assuming the LLC did so, the LLC's action is still barred because this action was commenced more than ten years from the time when the LLC's right to use the disputed road accrued. Because the gate was erected beyond the terminus of Northeast Shady Grove Road no later than 1970 (the last year the LLC could have used the road without permission), any right of action by the LLC and/or its predecessors in title should have been commenced against Nancy Martin's predecessor in title (E.F. Martin, Jr. and/or Jessie Dunn Martin) on, or before, 1980.

As such, the LLC's, along with the LLC's predecessors in title, failure to exercise reasonable diligence and pursue its claims against Defendant bars the LLC from maintaining the causes of action against Nancy Martin that relate to the LLC's right to use or access the dirt road through Defendant's property.

3. S.C. Code § 15-3-340

Finally, as an action for the recovery of real property, this action is also governed by S.C. Code § 15-3-340, which states that an action for the recovery of real property may not be maintained "unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seized

or possessed of the premises in question within ten years before the commencement of the action.” S.C. Code Ann. § 15–3–340 (emphasis added); *Portside Owners Ass’n, Inc. v. S. Beach Racquet Club, Inc.*, No. 2008-UP-153, 2008 WL 9837329 (S.C. Ct. App. Mar. 11, 2008).

As set forth herein, neither the LLC nor its predecessors in interest were “in possession” of an easement over the Martin Property because the LLC and its predecessors in interest did not access the road as a matter of right after the gate was erected in 1970. To satisfy the limitations period under S.C. Code § 15–3–340, the LLC would have to prove it or Pine Ridge Investments used Northeast Shady Grove Road as a matter of right anytime after March 18, 2004.

Permission cannot and does not amount to “possession” within the meaning of the statute. There is no evidence before the Court that the LLC possesses a deeded easement or that the LLC or its predecessor ever accessed the road without permission. The testimony is undisputed; only those with permission from the Martin family were allowed to place a lock on the gate. The DMHC would remove any unidentified locks on a regular basis. Mr. Podell testified he replaced Mr. Brazell’s combination lock with his own lock when he purchased the 1023.7 acre tract in 2009, and his lock was removed that same year. The earliest the LLC, or its predecessor in title, could have used the road as a matter of right (without permission) was before the gate was erected in 1970. Therefore, pursuant S.C. Code § 15-3-340, the statute of limitations ran in 1980, and the LLC’s claims are barred as a matter of law.

WHEREFORE, this Court finds for Nancy Martin on all claims asserted by the LLC. This Court also finds for Defendant on the Defendant’s Counterclaim. There is no easement (express, implied, prescriptive or public dedication) across the lands of the Defendant, Nancy Dunn Martin. Even if this Court were to find that an easement, of any kind, did exist at one time, Nancy Martin and her predecessors in title “locked out” the world by installing a locked gate in

1970. Additionally, the Defendants and her predecessors in title have also adversely possessed the land (i.e. the private dirt road) beyond the gate by installing the locked gate beyond the terminus of Northeast Shady Grove Road. Moreover, to the extent that there ever was an easement, of any kind, the statute of limitations has expired on any claim(s) that the LLC and/or the LLC's predecessors in interest may have had as a result of the locked gate that was installed beyond the terminus of Northeast Shady Grove Road.

IT IS SO ORDRED.

The Honorable Joseph M. Strickland
Master in Equity for Richland County

May ___, 2016

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Country Properties, LLC

☐ Plaintiff

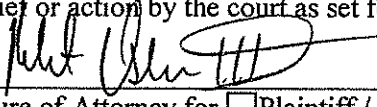
v.

Nancy Dunn Martin

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.
2014-CP-40-1805MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: John W. Wells, Bar No. Address: P.O. Box 10, Lugoff, SC 29078 phone: 803.438.4200 fax: e-mail: jwells@baxleywells.com other:	Defendant's Attorney: Robert C. Osborne III, Bar No. 101827 Address: P.O. Box 61110, Columbia, SC 29260 phone: 803.252.7693 fax: 803.254.5719 e-mail: rosborne@brunerpowell.com other:
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information Nature of Motion: Motion for Relief from Judgment Estimated Time Needed: 30 Minutes Court Reporter Needed: ☒ YES / ☐ NO	
SECTION II: Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for ☐ Plaintiff / ☒ Defendant October 24, 2017 Date submitted	
SECTION III: Motion Fee ☒ PAID – AMOUNT: 25.00 ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:	
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE _____ CODE: _____ Date: _____
CLERK'S VERIFICATION Date Filed: _____ Collected by: _____ ☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED – AMOUNT DUE: _____	

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Country Properties, LLC,

Plaintiff,

vs.

Nancy Dunn Martin,

Defendant.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 2014-CP-40-1805

**DEFENDANT'S NOTICE OF MOTION
AND MOTION FOR RELIEF FROM
JUDGMENT PURSUANT TO
RULE 60(b), SCRPC**

NOTED AND CORRECTED
FILED
2017 OCT 24 PM 3:55
JEANETTE W. HODGE
C.O.P. & C.S.

YOU WILL PLEASE TAKE NOTICE that, pursuant to the Order of the South Carolina Court of Appeals attached hereto as **Exhibit A**, Defendant Nancy Dunn Martin ("Martin" or Defendant"), by and through her undersigned attorneys, moves for relief from this Court's Final Order issued on September 27, 2016, in the above-captioned matter, pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure.

This matter involves Plaintiff's, Country Properties, LLC ("Plaintiff" or "Country Properties"), claim of an alleged easement across Martin's property. During the trial of the matter, Plaintiff and its counsel alleged that a portion of Plaintiff's property is inaccessible by road unless accessed by the alleged easement through Martin's property. In fact, the Final Order issued upon the conclusion of trial contained the following finding of fact:

That Plaintiff's tract has frontage on U.S. Highway 602 above Raglin Creek in Kershaw County but the Plaintiff's tract has no public road access south of Raglin Creek. *To the extent that Raglin Creek is a natural barrier to ingress and egress, the 384 acres of the Plaintiff's tract located south of Raglin Creek in Richland County has no access except via the easement that the Plaintiff seeks to establish in this action.*

Final Order at ¶ 6 (emphasis added). Additionally, the trial court stated:

I find from the testimony presented at trial that at some point several years before the plaintiff purchased his [sic] property in March of 2009, Pine Ridge Investments, LLC, the Plaintiff's predecessor in title, built a dam across Raglin Creek with a narrow road across the top of it making it safe for a vehicle to cross, but the dam has been damaged by storms, as it appears from a photograph, Plaintiff's Exhibit 37, showing a gap eroded from the dam, and during the historic rains of October 2015, the dam washed out completely. I find as a matter of fact from the greater weight of all the testimony presented, that Raglin Creek is a substantial natural barrier to the Plaintiff's ability to access the 384 acres of its property south of Raglin Creek in Richland County, and while the property south of Raglin Creek can be accessed by foot and has at times been accessible by personal vehicle, *the natural barrier of the creek does limit the Plaintiff's ability to access its lands south of the creek, particularly with large vehicles and equipment necessary to harvest timber on the lands in Richland County South of Raglin Creek.*

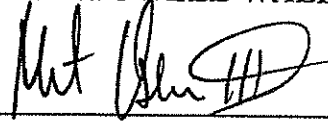
Final Order at ¶ 7 (emphasis added). Despite Plaintiff and its counsel making these representations which were ultimately included in the trial court's order, Martin recently discovered that the dam referenced in the Final Order has been rebuilt and once again provides Plaintiff with access to its property south of Raglin Creek. Photographs showing the rebuilt dam is attached hereto as a part of **Exhibit B**, the affidavit of Zack Sykes.

It is clear from this Court's Final Order that the Plaintiff's alleged inability to access portions of its property played a significant role in the court ruling that Plaintiff had an easement across Defendant's property. Given the importance of this issue, Martin hereby moves for relief from judgment pursuant to Rules 60(b), SCRCP.

This motion may be further supplemented by a memorandum of law, arguments of counsel and/or witness testimony at the appropriate time.

-Signature Page Follows-

BRUNER POWELL WALL & MULLINS, LLC



Joey R. Floyd

Wesley D. Peel

Robert C. Osborne III

Bruner Powell Wall & Mullins, LLC

P.O. Box 61110

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(803) 252-7693

Attorneys for the Defendant

Columbia, South Carolina

October 23, 2017

EXHIBIT A

The South Carolina Court of Appeals

Country Properties, LLC, Respondent,

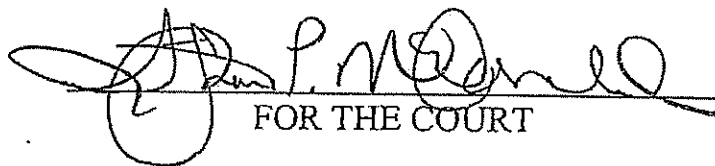
v.

Nancy Dunn Martin, Appellant.

Appellate Case No. 2017-001795

ORDER

Appellant has filed a motion for leave to make a motion for relief pursuant to Rule 60(b), SCRCP, with the trial court. Respondent filed a return, and Appellant filed a reply. After careful consideration, the motion is granted. This appeal shall be held in abeyance pending the trial court's ruling on the motion. Appellant shall provide this Court with status updates every thirty days.


FOR THE COURT

Columbia, South Carolina

cc:

Joey Randell Floyd, Esquire
Wesley Dickinson Peel, Esquire
Robert Crum Osborne, III, Esquire
John W. Wells, Esquire
Michael Brent McDonald, Esquire

FILED

October 5, 2017

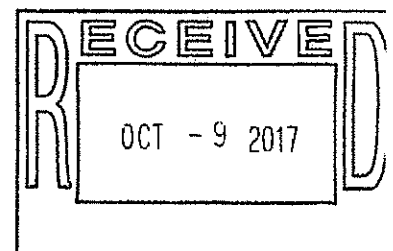


EXHIBIT B

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Country Properties, LLC,

Plaintiff,

vs.

Nancy Dunn Martin,

Defendant.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 2014-CP-40-1805

AFFIDAVIT OF ZACH SYKES

RICHLAND COUNTY
FILED
2017 OCT 24 PM 3:15
JEANETTE W. MCBRIDE
C.C.P. & G.S.

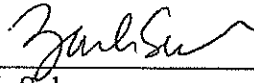
I, Zach Sykes, being first duly sworn, depose and say as follows:

1. I own and operate a DJI Phantom 3 Drone which is registered in compliance with all applicable laws and regulations.
2. On August 27, 2017, I operated my drone while standing on property owned by the Defendant in this case, Nancy Dunn Martin ("Martin"), located in Richland County, South Carolina.
3. While standing on Martin's property, I flew my drone over adjacent property owned by the Plaintiff in this case, Country Properties, LLC ("Country Properties").
4. Specifically, I flew my drone along Raglins Creek, the boundary between Richland County and Kershaw County.
5. While in flight, my drone captured video of the ground below, including pictures of Country Properties' land along Raglins Creek.
6. After the flight, using specialized computer software, I captured screenshots of the video thereby creating images of Country Properties' land along Raglins Creek.

7. The pictures attached hereto as **Exhibit A** are true, fair and accurate depictions of Country's Properties land along Raglins Creek on August 27, 2017.

8. I abided by and was in compliance with all applicable laws and regulations while flying my drone on August 27, 2017.

FURTHER AFFIANT SAYETH NOT.


Zach Sykes

SWORN TO BEFORE ME
this 23rd day of October, 2017

 (L.S.)

Shari Bookert (Printed Name)
Notary Public for South Carolina
My Commission expires 05/05/2026 (SEAL)



SHARI BOOKERT
NOTARY PUBLIC
SOUTH CAROLINA
MY COMMISSION EXPIRES 5/5/2026

EXHIBIT A

TO AFFIDAVIT OF ZACH SYKES



001 00000 NEW
15-01-01-01-01-01
15-01-01-01-01-01

001 00000 NEW

001 00000 NEW

DJI_0003.MOV
FRAME 5 677 9.28
08/27/2017

FOIA b 7
228

FOIA b 7
228

DJI_0003.MOV
FRAME 4:18 / 9:20
06/27/2017



ROA 001229

ROA 001229

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

Country Properties, LLC,

Plaintiff,

v.

Nancy Dunn Martin,

Defendant.

) **IN THE COURT OF COMMON PLEAS**
) **FIFTH JUDICIAL CIRCUIT**
)

) **Case No.: 2014-CP-40-01805**
)

) **PLAINTIFF'S RULE 59(e), SCRCP**
) **MOTION TO ALTER OR AMEND**
) **ORDER GRANTING DEFENDANT'S**
) **RULE 60(b) MOTION**
)

Plaintiff Country Properties, LLC (hereinafter "Plaintiff") hereby submits this Rule 59(e), SCRCP Motion to Alter or Amend the Order granting Defendant Nancy Dunn Martin's (hereinafter "Defendant") Rule 60(b), SCRCP Motion ("Order")(attached hereto as Exhibit A). Plaintiff received written notice of the entry of the Order on January 28, 2019. For the reasons stated herein, stated in the Plaintiff's memorandum in Opposition to the Rule 60(b) Motion, and stated at the hearing on the Rule 60(b) Motion, this Rule 59(e) Motion should be granted and the Order should be altered or amended in accordance herewith and Defendant's Rule 60(b) Motion should be denied.

Procedural Background

This Court entered its final order in this case on September 27, 2016. The final order found that Plaintiff had a prescriptive easement over the property of the Defendant, an easement by grant over the property of Defendant, and that the road in question was dedicated to the public. *See* September 27, 2016 Order. Defendant filed a Rule 59(e) and Rule 52(b), SCRCP, motion in November 9, 2016. That motion was denied on July 21, 2017. Defendant served a Notice of Appeal on August 22, 2017. On August 30, 2017, Defendant filed a motion with the S.C. Court of Appeals for leave to file a Rule 60(b)(2)-(3), SCRCP motion with this Court. The S.C. Court of Appeals granted the Motion for leave to file the Rule 60(b), SCRCP

motion on October 5, 2017.¹ Defendant filed the Rule 60(b) Motion with this Court on October 24, 2017. On July 18, 2018, the parties appeared and argued the Rule 60(b) motion before the Honorable Joseph M. Strickland. On January 28, 2019, the Court entered the Order granting Defendant's Rule 60(b) Motion.

Grounds for Altering and Amending Order

1. The Court erred in finding that Defendant met its burden of proof for relief under Rule 60(b)(2), SCRCP.
2. The Court erred in ruling that Rule 60(b) is applicable to the "new evidence" submitted by the Defendant.
3. The Court erred in ruling that the aerial photographs submitted by the Defendant in support of the Rule 60(b) Motion are material to the outcome of the case and not cumulative because the record in this case is replete with the evidence that the dam over the years has washed out and was then rebuilt. *See* Trial Transcript, p. 357, line 22-p. 359, line 12; *see also* Trial Transcript, p. 94, line 10-p. 95, line 18; *see also* Trial Transcript, p. 358, line 1-p. 359, line 12. In fact, this Court noted this in the factual findings in its original order. The fact that a dam was rebuilt once again as has been attempted throughout this property's history is not new or material evidence. In fact, nothing prevented the Defendant from attempting to introduce evidence at the trial of this action relating to the *ability* to rebuild the dam.
4. The Court failed to rule on Plaintiff's argument that evidence that the dam could be rebuilt or that Plaintiff may have additional means of access is not new evidence. Defendant argued in its Rule 59 motion that Plaintiff had additional access over the dam to its property south of Raglin Creek.

¹ The S.C. Court of Appeals made no findings on the merits of the Rule 60(b) motion.

5. The Court erred in ruling that the Plaintiff claimed a need for access based upon necessity. As previously pointed out in the Defendant's Rule 59(e) and Rule 52 Motion, Plaintiff did not claim an easement by necessity and the Court did not find an easement by necessity in its final order.
6. The Court erred in ruling that the aerial photos submitted in support of Defendant's Rule 60(b) Motion showed a condition that "eliminat[ed] any need for Plaintiff to traverse [Defendant's] property" and that such a condition was material to the types of easements claimed. Plaintiff did not claim an easement by necessity and the Court did not find an easement by necessity in its final order.
7. The Court erred in ruling that the court's analysis in its final order is changed because "evidence now suggests that Plaintiff can access all of its property via routes that do not transect [Defendant's] property." Plaintiff did not claim an easement by necessity and the Court did not find an easement by necessity in its final order.
8. The Court erred in ruling that alternative or additional means of access, even if they do exist, are material to the issue of a prescriptive easement claim or a claim of an easement by public dedication. It is well settled that the elements of a prescriptive easement or easement by public dedication do not consider, require or prevent additional or alternative means of access.
9. The Court erred in ruling that alternative or additional means of access, even if they do exist, would likely result in a change in the outcome of the trial finding a prescriptive easement claim and a claim of an easement by public dedication. It is well settled that the elements of a prescriptive easement or easement by public dedication do not consider, require, or prevent additional or alternative means of access.

10. The Court found in its final order, as a matter of law, that Plaintiff's chain of title established an express easement by grant. The Court erred in finding that the repair of a dam is in any way material to construing the language in deeds, as matter of law, and finding an express easement.
11. The Court found in its final order, as a matter of law, that Plaintiff's chain of title established an express easement by grant. The Court erred in finding that the repair of a dam would likely result in a change in the outcome of the trial where the express language in the deeds was found, as matter of law, to establish an express easement.
12. The Court erred in ruling that "prior to the original trial, Defendant did not have the opportunity to view the dam or to ascertain its importance to the accessibility of Plaintiff's property." The Defendant could have utilized discovery to view the dam at any point prior to trial.
13. The Court abused its discretion in granting a new trial pursuant to Rule 60(b).
14. The Court failed to rule on the Plaintiff's argument that since there is no evidence that the dam was repaired at the time of the trial, evidence that did not exist at the time of the trial cannot serve as a basis for a Rule 60(b)(2) motion. *See* Baicker-McKee, Janssen, and Corr, *Federal Civil Rules Handbook*, p. 1259 (2016)("Implicit in these [Rule 60(b)(2)] elements is the recognition that the evidence must be evidence of facts that were in existence at the time of trial, though not discovered until after trial.").

Conclusion

For the reasons stated herein, stated in the Plaintiff's memorandum in Opposition to the Rule 60(b) Motion, and stated at the hearing on the Rule 60(b) Motion, this Rule 59(e) Motion should be granted and the Order should be altered or amended in accordance herewith and Defendant's Rule 60(b) Motion should be denied.

Respectfully Submitted,

BUNDY MCDONALD, LLC

/s M. Brent McDonald

M. Brent McDonald, SC Bar # 78057

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BAXLEY PRATT & WELLS, P.A.

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Lugoff, SC 29078

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JWells@baxleywell.com

**Attorneys for Plaintiff Country Properties,
LLC**

February 6, 2019

CERTIFICATE OF SERVICE

I, Kathy Wentland, an employee of Bundy McDonald, LLC, hereby certify that true and correct copies of the PLAINTIFF'S RULE 59(e) MOTION TO ALTER OR AMEND ORDER GRANTING DEFENDANT'S RULE 60 MOTION, were served on all parties and Judge Strickland via Electronic Filing, Electronic Mail, U. S. Mail, postage paid, this 6th day of February 2019, as follows:

The Honorable Joseph M. Strickland
PO Box 192
Columbia, SC 29202-0192
(US MAIL Only)

Joey Randell Floyd, Esquire
Bruner Powell Wall & Mullins, LLC
P.O. Box 61110
Columbia, SC 29260
Attorney for Defendant Nancy Dunn Martin
jfloyd@brunerpowell.com

s/Kathy Jo Wentland

CERTIFICATION OF COUNSEL

Pursuant to Rule 210(g), SCACR, the undersigned counsel certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



Chelsea J. Clark, Esquire

Columbia, South Carolina
April 21, 2022

RECEIVED

May 23 2022

SC Court of Appeals